Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October Term 2001

GARY VICTOR DUBIN and GREGG YOUNG,

Petitioners,

vs.

BANK OF HAWAII and JOHN CANDON, and CATHY A. CATTERSON, Clerk, United States Court of Appeals for the Ninth Circuit,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 1961 of Title 28 require that the rate of post-judgment interest, as determined at the time judgment is entered, remain the same throughout the entire duration of the interest accrual period, notwithstanding that significant changes are taking place in the Federal Reserve's weekly average 1-year constant maturity Treasury yield upon which the initial post-judgment interest rate was based?

2. Is it a violation of due process and equal protection for a district court to require that a judgment debtor must deposit his or her all-cash supersedeas bond with the clerk for deposit into the court's local bank account where less interest is being paid than is being earned by members of the general public at the same time at the same bank, thus depriving the judgment debtor of market-rate interest?

3. Is it a violation of due process and equal protection for a district court to require that a judgment debtor must deposit his or her all-cash supersedeas bond with the clerk for deposit into the court's local bank account in which less interest is being paid than is being earned by members of the general public at the same time at the same bank, while simultaneously requiring that the judgment debtor be responsible to his or her judgment creditor, in the event the appeal is unsuccessful, for an amount of post-judgment interest which is substantially higher than the interest being earned in the clerk's below-market-rate account?

4. Is it a violation of due process and equal protection for a court of appeals' panel and for a clerk's office to block an appellant's request to apply to the entire court for en banc review where his or her panel, affirming by Memorandum the judgment below, has decided a controlling question of law differently than has another panel of the court in a published opinion, and where that other panel has instead vacated the judgment in that another case on opposite grounds and as to another appellant similarly situated?

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I. JURISDICTIONAL STATEMENT

The district court entered a "Final Judgment Awarding Rule 11 Sanctions" on January 18, 2000, against Petitioners, attorneys Dubin and Young, who represented two plaintiffs in two consolidated cases below, adopting verbatim the "Report of Special Master" which was filed on September 20, 1999, in the district court.

Young and Dubin then filed separate notices of appeal on January 20, 2000, and on January 24, 2000, respectively, and Dubin posted a $116,000 cash supersedeas bond, as required and as approved by the district court on February 4, 2000.

A three-judge panel of the court of appeals subsequently affirmed the $116,862.32 Rule 11 sanctions award in a Memorandum disposition dated November 20, 2001, in both consolidated appeals, Case No. 00-15202 (Dubin) and Case No. 00-15157 (Young).

Petitioners filed a timely motion for reconsideration below, which was denied on February 7, 2002. However, on April 25, 2002, the Court of Appeals stayed its Mandate pending the filing of a petition for writ of certiorari, which was filed in this Court on May 8, 2002, as Case No. 01-1666, the disposition of which is still pending, having been distributed and scheduled for conference of September 30, 2002.

Meanwhile, subsequent to the filing of the first petition for writ of certiorari, two events occurred which resulted in still further adverse, final decisions by the panel which heard Dubin and Young's appeals, for the correction of which this second petition for a writ of certiorari is respectfully submitted.

First, Respondent Bank of Hawaii moved on May 3, 2002, to have the already $116,000 cash bond increased by $15,800 more pending review of the first petition by this Court, and Respondent Candon filed a "qualified joinder."

Second, another three-judge panel of the same court of appeals contemporaneously decided an identical, dispositive issue in Dubin and Young's appeals in another Rule 11 case for another attorney totally differently, in Christian v. Mattel, Inc., 286 F.3d 1118 (filed April 15, 2002), reversing instead of affirming on appeal, creating a dramatic intra-circuit conflict.

In response to both motions, the same panel that decided Dubin and Young's original appeals, in one subsequent order granted the motion for additional security, while denying the motion for reconsideration, choosing to ignore the intra-circuit conflict, and then, following Petitioners' filing of a petition for writ of mandamus to require that the clerk of the court of appeals distribute their motion for reconsideration to the full court as had been originally requested yet unaddressed by the panel, the same panel refused to have the clerk submit Petitioners' request *en banc* to resolve the intra-circuit conflict.

It is the review of those subsequent decisions, decided by Petitioners' same panel, which is now being sought in this *second* petition for writ of certiorari, and Petitioners will be filing an appropriate motion, in the interests of judicial economy and justice, to have this Court consider both petitions simultaneously.

This second petition is being filed by Dubin and Young (1) within 90 days of the entry of the complained of order, which filing occurred on May 29, 2002, and (2) within 90 days of the entry of the denial of its reconsideration, which denial occurred on June 26, 2002, and (3) within 90 days of the refusal of the panel, although the petition for writ of mandamus was directed to the full court, to entertain their petition for writ of mandamus to require that the matter be submitted en banc as had been requested, which denial occurred on August 19, 2002.

Thus, all of Petitioners' efforts to secure justice below have been *exhaustively* exhausted prior to petitioning this Court for relief, and this petition is now being filed pursuant to the collateral order doctrine, Cohen v. Beneficial

Industrial Loan Corp., 37 U.S. 541, 546 (1949), and the Forgay doctrine, Forgay v. Conrad, 47 U.S. 201 (1848), and consistent with the requirements of Section 1254(1) of Title 28 and Supreme Court Rules 10, 12(4), 13, 30(1), seeking review and ultimate reversal, requiring at the very least that this Court remand and order the court of appeals to consider and to resolve expeditiously the intra-circuit conflict, as this Court has routinely expected and required in other cases before it, in identical circumstances, in all circuits.

II. AUTHORITATIVE PROVISIONS

The principal governing provisions of law are set forth, for the Court's convenience, at the rear of this second petition, both in Appendix A (recopied from Petitioners' first petition, still pending) and in Appendix B:

Appendix A: The Fifth Amendment (due process of law), Section 144 of Title 28 (judicial bias or prejudice), Section 455 of Title 28 (judicial disqualification), Judicial Canon 3(A)(4) (*ex parte* communications), Judicial Canon 3(C)(1)(a) & (d)(iii) & (iv) (appearances of impropriety), and Rules 11 (sanctions) and 53 (masters) of the Federal Rules of Civil Procedure.

Appendix B: Section 1961 of Title 28 (post-judgment interest).

III. STATEMENT OF THE CASE

The underlying facts pertaining to the imposition of Rule 11 sanctions against Dubin and Young, and the egregious amount of those sanctions, have already been presented in Petitioners' first petition for writ of certiorari which is now pending conference in Case No. 01-1666 in this Court, and thus without prejudice will not be repeated here -- which seeks reversal based on numerous due process violations, a copy of which already submitted petition is set forth in Appendix A, both for the convenience of the Court so that a relatively complete record is available

to the Court, and to illustrate why both petitions should be consolidated and jointly reviewed and decided.

A. Facts As To Excessive Post-Judgment Interest

On January 18, 2000, Dubin filed a motion in the district court for a stay of the $116,000 Rule 11 sanctions order pending review, which was heard by the district court on January 31, 2000; in their opposition papers and at the hearing, both Respondents[1] demanded that there be added to the cash bond a sum for projected interest – the Bank of Hawaii requesting a total cash bond of $140,000, and Candon requesting a total cash bond of $130,000 (*Transcript of Proceedings Re Stay Pending Appeal*, January 31, 2000, p. 4, lines 20-22, p. 8, lines 10-13).

Specifically, Respondents argued to the district court that the bond should include, in the alternative, either interest "or a full cash deposit under the control of the court" (*id.*, p 9, lines 20-21).

At the conclusion of the January 31, 2000, bond hearing, the district court decided that a deposit of $116,000 in an interest-bearing account with the clerk of the district court -- without additional sums being deposited for interest -- would fully protect both Respondents (*id.*, p. 16, lines 17-19).

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1 "Respondents" as used here refers only to Bank of Hawaii and John Candon. In an effort to require their panel to submit Petitioners' subsequent motions to the full court en banc, a separate writ of mandamus was filed against the Clerk of the Court, whereupon that petition was denied by the same panel; although, in seeking review of that order as well in Case No. 02-71843, Ms. Catterson, there named as the "Respondent," has also been named as a Respondent here, but the references in the text above to "Respondents" refers only to the two real parties in interest, Bank of Hawaii and John Candon.

However, despite Dubin's sensible request that the money be deposited privately in the highest interest bearing account possible at First Hawaiian Bank "in trust for the clerk of the court" (*id.*, p. 19, lines 4-8), the district court determined otherwise: "I will direct that it be deposited in an interest-bearing account at the highest interest which is attainable consistent with being able to withdraw the money at the court's discretion . . . with the clerk of the court" (id., p. 10, lines 19-22, 18-19).

By order entered on February 4, 2000, the district court, noting in its order that the "Defendants request that the amount of the bond be either equal to 120% of the final judgment or $130,000, which represents the underlying sanction award of over $116,000 plus estimated interest [fn.1 'The federal rate of post-judgment interest as of January 4, 2000 is 5.997%'], nevertheless rejected Respondents' joint request, directing instead that "Dubin and Young must . . . [p]ost a cash bond in the amount of $116,000 with the clerk of the court. The cash bond will then be deposited into an interest bearing account" (*Order Granting Motion For Temporary Stay Of Final Judgment Awarding Rule 11 Sanctions, And Order Setting Bond*, February 4, 2000, p. 6).

With borrowings from clients and friends, Dubin posted the required $116,000 cash bond with the clerk of the district court on February 10, 2000, and by letter of transmittal requested that the Chief Clerk deposit the funds, as directed by the district judge, into an interest bearing account, but at First Hawaiian Bank which was offering a long-term CD interest rate of 6.00% at the time, higher than the 5.997% stated to be the "federal rate of post-judgment interest," and much higher than what the district court was yielding from its "federal deposit account" at the same bank at the time, which for still unexplained reasons is well below market rates (see Dubin's letter of transmittal to the Chief Clerk dated February 10, 2000, set forth in Appendix B2, at B2-B3).

The Chief Clerk informed Dubin, however, that he was required to place the funds, as directed by the district judge in his order, into the Clerk's federal depository account at the same bank – First Hawaiian Bank – which was however by contract with the federal government earning a lower interest rate than what was privately obtainable – which Dubin thought grossly unfair but somewhat palatable since Dubin assumed that the mandatory federal depository account interest rate in Hawaii was the federal post-judgment interest rate and would at least therefore cover any interest due were Dubin unable to overturn the sanctions order on appeal.

After the sanctions order was affirmed on appeal by Memorandum decision on November 20, 2001, and reconsideration denied on February 7, 2002, and a stay of the mandate pending petition to this Court approved, Respondents moved to increase the bond supposedly for fear of not being able to collect interest in excess of what was being earned in the federal depository account due to claimed appellate delays, despite sharply declining market interest rates, and for the first time Respondents argued that Petitioners were liable for a post-judgment interest rate substantially higher than what was being earned by Dubin in the clerk's federally mandated depository account at First Hawaiian Bank in Honolulu.

Specifically, Respondents urged the panel below to interpret Section 1961 of Title 28, the text of which is set forth in Appendix B1, at B1, (1) as requiring that the post-judgment interest rate be firmly set at whatever the applicable federal rate was when the sanctions order was entered, and (2) that it made no difference whatsoever (a) that Dubin was forced by the district court to deposit the funds in a mandated federal depository account earning substantially less interest than what would have been available at the same identical local bank were the funds to have been deposited in trust outside of the mandated federal depository account either for the benefit of the court clerk or in the name of an agreed upon trustee which of course is the favored procedure often done in litigation in

similar situations, or (b) that market rates had declined substantially since the sanctions order was entered and since the funds had been involuntarily deposited in court.[2]

After voluminous briefing of all of the relevant factual, equitable and legal issues, the panel below agreed with the Respondents, and by order entered May 29, 2002, the text of which is set forth in Appendix B3, at B3-B4, required Petitioners to post another $15,800 in the district court's local low-interest-bearing depository account, which the panel concluded was now yielding annual interest below 1 percent, without the panel even addressing any of the contested issues in its otherwise cryptic order, and without making any findings of fact or conclusions of law whatsoever, although properly and timely requested of the panel by the Petitioners.

Reconsideration *en banc* was also robotically denied by a form order entered June 26, 2002, the brief text of which is set forth in Appendix B4, at B4.

B. Facts As To Failure To Resolve Intra-~~Circuit~~ Conflict

Immediately after filing the first petition in this Court in Case No. 01-1666, Petitioners learned that the unpublished Memorandum decision of their panel conflicted substantially with a published opinion by another panel of the same court of appeals in Christian v. Mattel, Inc., 286

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[2] Appendix B5, at B5-B8, shows what has happened to the applicable Section 1961 post-judgment interest rate since January 2000, dropping from **6.03 percent**, to a low today of **1.67 percent** – compared to an even lower, artificial federal depository rate in Honolulu during all of that period for Hawaii district court funds, dropping to **1 percent** this Spring, and likely even less today (see May 29, 2002, order, Appendix B3, at B3), compared to First Hawaiian Bank's actual market interest rates where the Hawaii district court deposits its (and Dubin's) funds, yielding roughly twice the interest rate being earned by the district court.

F.3d 1118 (filed April 15, 2002) (a petition for rehearing *en banc* in Christian was denied recently on July 2, 2002).

Both cases were active at the time of decision: In Christian, there was pending a petition for rehearing with a suggestion for the appropriateness of a rehearing *en banc* (Case Nos. 00-56194 and 00-56579). In the Dubin and Young appeals, the mandate had been recalled and the jurisdiction of the court of appeals restored (Case Nos. 00-15157 and 00-15202).

In Christian, a merits panel consisting of Chief Judge Schroeder, Circuit Judge McKeown, and District Judge Zilly, after applying an abuse-of-discretion standard in determining whether a complaint was frivolous or not, reversed and remanded on the grounds that the amount of a Rule 11 award cannot be intertwined with, nor based in part upon, conduct other than that of a filed pleading, nor on conduct occurring in other litigation.

The Christian panel on remand further "encouraged" the district court to ensure that the time spent challenging a frivolous complaint was reasonable and appropriate, and the award only for those "'services directly and unavoidably caused' by the sanctionable conduct," quoting from the advisory notes to the 1993 amendments to Rule 11, so as not to reward "a bazooka response," which in Christian generated an award for Mattel based on 700 hours or $173,151.50 in fees, id., fn. 12 – not too dissimilar an amount as that awarded below here.

The Christian panel also denied Hicks' claim that the district court erred by ignoring evidence of his inability to pay, holding that "nothing in Rule 11 mandates a specific weighing of this factor," id., footnote 4.[3]

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[3] This provides still additional evidence in support of one of the major points in Petitioners' first petition in Case No. 01-1666, the Ninth Circuit on this issue being clearly in a minor of one among all of the circuits, Appendix A, at 26-29.

The panel in Dubin and Young viewed Rule 11 much differently, which resulted in a contrary result for Dubin and for Young with respect to the $116,862.32 Rule 11 sanction levied against them, as follows:

The district court in Dubin and Young based its Rule 11 sanction, as did the district court in Christian, which led to reversal there, both upon conduct occurring during the course of the litigation *after* the filing of a supposedly frivolous complaint, and also upon conduct allegedly occurring and having occurred *in other cases*.

Thus, in the district court's sanctioning order in Dubin and Young, they were scolded, not only supposedly for filing a frivolous complaint in the judge's court, but:

a. for failing in another case supposedly "to request permission from the bankruptcy court in order to sue the Trustee," although never sanctioned in bankruptcy court nor found professionally culpable there,

b. for failing supposedly "to comply with the specific pleading requirements of Federal Rule of Civil Procedure 9(b),"

c. for failing supposedly "to comply with Local Rule 9.1 which requires a RICO statement," *subsequent* to filing of the complaint,

d. for failing supposedly to comply with a bankruptcy judge's warning in another case, where again no sanctions were issued, not to act "in contravention of the Trustee's authority,"

e. for their supposed "negotiating tactic designed to maintain leverage against the Defendants in order to achieve a settlement" of *another action* in *another jurisdiction,*

f. for their supposed *joint* "harass-and-delay strategy" in other bank litigation in which Young was not even counsel at the time nor even known to Dubin, and

g. in order "to put an end to their continued misuse of the federal court system" (*Order*, December 7, 1998, Civil Nos. 98-00453 and 98-00475, pp. 5, 6, 8, and 9).

Timely objection was made to the district court's "inherent power" sanctioning of Dubin and Young under the guise of Rule 11, and without an evidentiary hearing, on virtually the same identical grounds, *inter alia*, adopted by the remanding Christian panel, yet that important issue was completely ignored by Respondents' three-judge court of appeals panel (*Motion*, filed August 15, 1999, in Civil Nos. 98-00453 and 98-00475, contrary to the extensive treatment that issue received in the Christian opinion, while Petitioners' panel's Memorandum affirmed the sanctions *en toto* nevertheless, Appendix A21, at A192-198).

Reconsideration was not only denied by the district judge with language directly contradicting the language of his original sanctioning order, *supra*, making back-tracking excuses that "the basis for the sanctions" was only the "filing of frivolous complaints" (*Order*, filed August 31, 1999, Civil Nos. 98-00453 and 98-00475, pp. 2-3), but Rule 11 fees were even granted to the Respondents below for opposing that motion, compounding what the Christian panel saw, to the contrary, as automatic reversible error.

Both independent opening briefs submitted to their panel on behalf of Dubin and Young requested reversal, *inter alia*, based on the very non-Rule 11 sanctioning which led to the speedy reversal in Christian.

In Dubin's opening brief, it was argued with extensive documentation that the district court "exceeded its Rule 11 sanctioning authority" (*Brief of Appellant* in Case No. 00-15202, pages 21-26), and that such non-Rule 11 sanctioning violated Dubin's due process rights, there having been no such prior notice, nor any evidentiary hearing on those inherent sanctioning issues (id., pages 59-60).

In Young's opening brief, the logic in Christian was not only similarly presaged, but supported on additional

constitutional grounds, Young explaining that "to issue sanctions based on such distortions not contained in the record was tantamount to a finding of contempt based on facts occurring outside of the court's presence and on hearsay" (*Brief of Appellant* in Case No. 00-15157, page 33).

Unlike the Christian panel, Dubin's and Young's panel, in its unpublished Memorandum disposition, filed November 20, 2001, merely matter-of-factly addressed the non-Rule 11 sanctioning issue in three sentences under the heading of "improper purpose," rubber-stamping the district judge's "discretion," finding that he had "had ample justification" for his findings (*Memorandum*, page 7, Appendix A21, at A192-198):

a. that "the complaints were filed for the improper purpose 'of harassing and pressuring the Defendants to settle other pending litigation,'" and

b. that Dubin and Young's "parade of motions for reconsideration, for striking orders [such as that objecting to Christian-type non-Rule 11 sanctioning!], and for disqualifying the judge and the special master [issues also not addressed by the appellate panel] cumulatively suggest a strategy of harassment."[4]

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[4] There appears to be spreading in some circles a kind of analytical sickness, principally among some relatively overly defensive federal trial judges, who, occasionally lacking in judicial temperament -- there being no effective means of controlling their excesses -- seem to confront any disagreement with their opinions in court as approaching sanctionable professional blasphemy, or worse, at least in their unsupervised treatment of attorneys appearing before them, while they ingratiate themselves with their appellate colleagues, who unfortunately know nothing about their real selves, except for their collegiality, as they sit with them on appellate panels and Ninth Circuit committees.

Dubin filed a timely "Petition For Rehearing With A Suggestion For Rehearing En Banc," in which Dubin again argued the non-Rule 11 sanctioning issue to his panel, while additionally citing the contradictory application of Rule 11 reviewing standards in the Ninth Circuit, *id.*, pages 1-2 -- which Petition was denied by the panel after first amending its Memorandum in response to add a *de novo* standard of review as an afterthought and additional ground it was maintaining for its decision, even though its original disposition speaks only of upholding "the discretion of the district judge"; a copy of the panel's February 7, 2002, rehearing denial is set forth in Appendix A198.

That denial of Dubin's earlier Rehearing Petition draws important attention to yet another contradiction in his panel's Rule 11 appellate jurisprudence, for the following reasons:

a. in United National Insurance Co. v. R&D Latex Corp., 242 F.3d 1102 (9th Cir. 2001), another Ninth Circuit panel consisting of Circuit Judges Noonan, Trott, and Berzon held that "the determination that counsel violated the rule [Rule 11]" is made "under a de novo standard," 242 F.3d at 1115, yet Dubin's and Young's panel, consisting also of Circuit Judge Berzon, found that they had violated Rule 11, in its Memorandum, at 7, by applying an abuse of discretion standard instead ("in sum, the district court did not abuse its discretion in finding that the complaint was 'both baseless and made without a reasonable and competent inquiry,' Townsend, 929 F.2d at 1362,"

b. after presented with Dubin's Rehearing Petition, the panel amended its disposition to add a footnote recital, based upon R&D, *supra*, that "the result would be the same, as we would conclude de novo that counsel violated Rule 11," and

c. the Christian panel made the same mistake as Dubin's and Young's panel originally did, basing its disposition also upon an abuse-of-discretion standard for reviewing Rule 11 impositions ("we review the district court's factual findings and legal conclusions under a far more

deferential standard than the traditional de novo review of a summary judgment order. We review the district court's decision to impose Rule 11 sanctions – and, if they are warranted, the reasonableness of the actual amount imposed – for abuse of discretion."[5]

The urgent need for full court of appeals' consideration in such situations, especially concerning issues involving the proper supervision of district judges in Rule 11 situations, is all the more urgently needed when one considers that Dubin and Young were sentenced to financial "capital punishment," as it were, based upon, the record amply shows, the district judge's admitted personal dislike of Dubin, in a one-party State, their having brought suit against the most powerful financial and political institution in Hawaii, not unknown for decades until perhaps recently for its singular ability, for instance, to influence judicial appointments.

Moreover, they were sanctioned in the amount of $116,862.32 without serious consideration of either Dubin's or Young's obvious inability to pay, for -- as far as their district judge was concerned -- not for the filing of a frivolous complaint *per se*, when measured perhaps by nationwide research standards, but because of a troubling judicial mind-set, upset that they dared in his view to argue cases to him outside his circuit (*Sanctions Order*, December 7, 1998, Civil Nos. 98-00453 and 98-00475, pp. 5-6):

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[5] One can only conclude from all of this that there appears to be a huge and alarming lack of uniformity in the Rule 11 decisions of the various panels of the court of appeals in the Ninth Circuit, which of course gives little comfort to one who has had to borrow $116,000, and now another $15,800, to bond a Rule 11 sanction which would have been reversed had another panel perhaps had the appeal.

> To the extent that Plaintiffs argue that it may be the law in this Circuit, but not until the United States Supreme Court were to rule would it be the law of the United States given the differing approaches in other Circuits, Plaintiffs fail to acknowledge that Ninth Circuit law governs decisions of the district courts within this Circuit absent Supreme Court authority to the contrary.

By order filed April 25, 2002, Dubin's and Young's panel recalled the mandate that had been prematurely issued, and a majority of their panel stayed the mandate so that Dubin and Young could file a Petition For Writ Of Certiorari, which they did on May 8, 2002 in Case No. 01-1666.

Immediately upon learning of the Christian decision, Petitioners on May 20, 2002, filed a "Motion For Leave To File Renewed Petition For Rehearing, And Renewed Petition For Rehearing, Both Submitted To The Entire Court With A Suggestion Of The Appropriateness Of En Banc Consideration, Based Upon A Recent, Supervening Intra-Circuit Conflict" – again to no avail.

The motion was immediately denied by the panel in a one-sentence order, on May 29, 2002, without any consideration whatsoever of the identified intra-circuit conflict ("Appellants' motion for leave to file a renewed petition for rehearing and rehearing en banc is denied"), and their motion was never even submitted to the full court as requested (Appendix B4).

Whereupon, Petitioners filed a new petition with the full court of appeals, for a writ of mandamus to require its clerk to submit the motion finally *en banc*, but that writ request was similarly completely ignored, denied by the same panel once again, and again virtually without comment, and never submitted to the full court (Appendix B4, at B4-B5).

IV. LEGAL ARGUMENT

A. The Court of Appeals' interpretation of Section 1961 is not only illogical and fundamentally unfair, but as applied to these Petitioners who were forced to deposit funds into a below-market federal depository account violated their due process and equal protection rights.

Because of the understandable underlying concern that delays in recovery on judgments should not be borne by the prevailing party while a case is being appealed, so as not to provide incentive for delay, Congress since 1842 has mandated that judgments rendered in all Circuits bear post-judgment interest so as to equalize the position of the parties during appeals, Section 1961 of Title 28 of the United States Code; see, e.g., Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973) (attorneys' fee awards subject to post-judgment interest); Moore-McCormack Lines v. Amirault, 202 F.2d 893, 895 (1st Cir. 1953); Reeves v. International Telephone and Telegraph Corp., 705 F.2d 750, *rehearing denied*, 709 F.2d 358 (5th Cir. 1983).

On the other hand, the purpose of post-judgment interest is not to provide prevailing parties with windfall amounts of interest which inequitably exceed actual market rates, but to ensure merely "a fair level of compensation" approximating the rate of return that the prevailing party "could have received" but for delays during appeal, Todd Shipyards Corp. v. Auto Transportation, S.A., 763 F.2d 745 (5th Cir. 1985), requiring adjustment "for both inflation and time value of money," Shakman v. Democratic Organization of Cook County, 677 F. Supp 933 (N.D. Ill. 1987).[6]

However, like so many federal statutes, the striking of an equitable balance between, one, allowing post-judgment interest as of right during the taking of an appeal

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[6] "[T]he policy underlying the postjudgment interest statute – compensation for the plaintiff for the loss of the use of the money," Kaiser Aluminum v. Bonjorno, 494 U.S. 827, 834 (1990).

as of right following the posting of a *supersedeas* bond as of right, and, two, establishing discretionary post-judgment interest rates during the period of an appeal, has proven a highly difficult task for the federal judiciary given the differences between state post-judgment interest statutes, as well as the differences in fluctuating market interest rates.

Initially, federal courts were satisfied to apply state post-judgment interest rates, but that resulted in a lack of uniformity, resulting eventually in adherence to a single federal post-judgment interest rate, but when that change was made, two additional questions remained for judicial determination:

Was the new federal approach to be applied retroactively in cases where federal verdicts and judgments had already been entered prior to that change in federal law?

Was the new federal rate to commence upon the entry of a verdict, or the entry of judgment?

Both issues were decided by this Court in Kaiser Aluminum v. Bonjorno, 494 U.S. 827 (1990), but a close reading of that opinion shows that the Borjorno decision did not decide the specific post-judgment interest issue here.

In Borjorno, this Court had before it only the questions whether Section 1961, as amended, required that post-judgment interest be calculated from the date of the verdict or the date of the judgment, and whether the then most recent amendment to Section 1961 was retroactive.[7]

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[7] "We granted certiorari . . . primarily to consider three questions: First, whether interest should be calculated from the date of verdict or the date of judgment; second, whether interest should be calculated from the date of a legally insufficient judgment; and third, the proper application of Section 1961 to judgments entered before the effective date of amended Section 1961," 494 U.S. at 834.

A divided Court in Bonjorno answered *yes* to both questions.

What Bonjorno did not do, nor has any circuit court yet done, is to decide whether a prevailing party may invoke a single post-judgment interest rate throughout the entire time of an appeal:

a. where, for instance, market rates thereafter have significantly fallen, or

b. where, for instance, appellants are forced, over their written objection, to place their borrowed *supersedeas* cash in an interest bearing account with a district court clerk in a federally-mandated depository account which by agreement between a local bank and the federal government draws interest at a substantially below market rate, supposedly for advantages to the clerk's office only, which has nothing to do whatsoever with the post-judgment handling of *supersedeas* cash bonds.

There is admittedly confusing language found in Bonjorno, falling outside of what was actually briefed or before the Bonjorno Court, upon which the panel below, which kept its views once again entirely to itself, may have actually been relying ("we think the most logical reading of the statute is that the interest rate for any particular judgment is to be determined as of the date of the judgment, and that is the single rate applicable for the duration of the interest accrual period," 494 U.S. at 838-839 (emphasis added), but such a conclusion is unexamined *dicta* at best and it is submitted is clearly unwarranted for a number of important reasons.

First, that issue was not even briefed, nor before the Court in Bonjorno, the majority's language emphasizing uniformity of rates only within the context of the retroactivity and commencement-date issues it addressed;

Second, the Court was interpreting the pre-2000 version of Section 1961, without analysis of Congressional intent with respect to subsequent amendments;

Third, had the Court and the parties examined and briefed Congressional intent with respect to the issue under review here, they would have found evidence that Congress did not intend that the federal post-judgment interest rate, even prior to 2000, was to be considered fixed once and for all in each case at time of judgment, but was thought to require modern day adjustments according to fluctuating market rates; see, *e.g.*, Senator Thumond's view of that precise issue recorded in the Congressional Record, 132 Cong. Rec. S 5698, 99th Congress, May 8, 1986, while advocating the attractiveness of applying the Section 1961 interest rate formula to another part of the U.S. Code:

> This could be accomplished by amended Section 258a to provide for an interest rate similar to one previously approved by Congress and found at 28 U.S.C. 1961. The proposed amendment [to Section 1961 which passed in 2000] requires the district court to follow a statutory formula which is based on the yield of one-year Treasury bills, using the accepted auction price of the last auction of the bills settled immediately prior to the date of the taking. If interest is owed for more than one year, our amendment provides for compounded interest using the same formula but based on the auction price for each additional year. This is patterned after the provisions of 28 U.S.C. 1961, providing for the calculation of post-judgment interest by reference to the rates on one-year Treasury bills. (Emphasis added)

Fourth, the majority in Bonjorno, in its questionable *dicta*, *supra*, merely was in reality probably referring only to maintaining a single rate "during the duration of the interest accrual period," which might well be interpreted just as easily to have been referring to the same one-year renewed accrual period during each appeal, which Senator

Thurmond was referring to, at which time the interest would be compounded and reset periodically.

This is truly a case of first impression, underscoring the inevitable conflict, due to modern day fluctuating interest rates and varying lengths of appeals, between two underlying and competing policy considerations: protecting a prevailing party from loss due to the time value of money *versus* protecting a losing party from having to provide a prevailing party with windfall interest, as here, well above market rates.

Given the fundamental importance of this issue to literally tens of thousands of judgments being rendered yearly by our district courts, many of which involve post-judgment interest, surely this is too important an issue to the federal legal system to withhold review, especially in a case such as this where Petitioners were forced to put their cash into a mandatory, below-market, interest rate federal depository account at a local bank which continues to advertise to the public interest rates that are nearly double or triple that -- which for some yet unknown reason the federal court in Hawaii is unable to bargain for, this Court's review made all the more urgent especially since it was this Court's unfortunate choice of words in Bonjorno that apparently may have confused the panel below.

B. The Court of Appeals' refusal to resolve the contemporaneous intra-circuit conflict between the Memorandum decision of the panel in Dubin's and Young's cases and the published opinion of another of its panels in the Christian case violates Petitioners' due process and equal protection rights.

Intra-circuit conflicts can only be resolved by a court of appeals *en banc*, United States v. Hardesty, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*) (the *en banc* Court consisting of Chief Judge Wallace, and Circuit Judges Tang, Pregerson (dissenting), Alarcon, Poole, Canby, Norris, Beezer, Hall, Brunetti, and Fernandez), quoting with approval from Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1478-1479 (9th Cir. 1987) (*en banc*), *cert. denied*,

485 U.S. 989 (1988): "the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision. . . . **[a] panel faced with such a conflict must call for en banc review**" (emphasis added in Antonio; emphasis here added in bold face type).

Why was that not so in Dubin's and Young's cases?

For, that was especially true with respect to Dubin's and Young's consolidated appeals, for the supervening opinion in Christian is published and hence now binding on their panel and all panels, at least theoretically, unless reheard, whereas their disposition was not published and has no corresponding precedential value, Haynes v. Williams, 88 F.3d 898, 900 fn. 4 (10th Cir. 1996).

Petitioners, upon learning of the Christian decision, filed their rehearing motion with a suggestion for *en banc* consideration, it is submitted, *as a matter of right*, pursuant to F.R.A.P. Rule 35.

Not only have intra-circuit conflicts always been considered, as a matter of fairness and common sense, an appropriate and necessary grounds for *en banc* consideration,[8] especially, as here, where conflicts have emerged simultaneously from different merit panels of the same court, but that issue was long ago decided by this Court in United States ex rel. Robinson v. Johnston, 316 U.S. 649 (1942), which in a similar situation vacated the Ninth Circuit's earlier refusal to give *en banc* consideration to such intra-circuit conflicts:

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[8] Outspoken criticism, openly voiced in recent years even by Justices of this Court, understandably concerned over the inordinate number of intra-circuit conflicts occurring in the Ninth Circuit especially, which has the largest circuit court bench in the federal system, is well known – one more reason why special scrutiny by this Court over the process by which intra-circuit conflicts are identified and handled is so urgently needed today.

> On petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
>
> PER CURIAM.
>
> The motion for leave to file a second petition for rehearing is granted. The second petition for rehearing is granted. The order denying certiorari is vacated and the petition for writ of certiorari is granted. The motion for leave to proceed in forma pauperis is also granted. In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston, 118 F.2d 998, 1001, and Crockett v. United States, 125 F.2d 547, 548, 549), and in view of this Court's decision in Waley v. Johnston, 315 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302, reversing 9 Cir., 124 F.2d 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court en banc. See Textile Mills Corp. v. Commissioner, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249.[9]

Litigants have at the very least the right to make that suggestion to the full Court, Western Pacific Railroad Corp.

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[9] As this Court further explained in Western Pacific Railroad Corp. v. Western Pacific Railroad Corp., 345 U.S. 247, 260 n.20 (1953), "In the Robinson case, supra, where it appeared that a 'conflict of views' had arisen 'among the judges of the Ninth Circuit', we remanded the case 'for further proceedings, including leave to petitioner to apply for a hearing before the court en banc.' 316 U.S. 649, 650, S.Ct. 1301.

v. Western Pacific Railroad Corp., 345 U.S. 247, 259-260, 261-262, 268 (1953):

> But even if the statute grants only power plus the discretion for its exercise, that does not mark the end of our review of the en banc phase of this case. The en banc power, confirmed by s 46(c), is, as we emphasized in the Textile Mills case, a necessary and useful power--indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate. If s 46(c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals. In the exercise of our 'general power to supervise the administration of justice in the federal courts,' the responsibility lies with this Court to define these requirements and insure their observance. * * * *
>
> It is also essential that litigants be left free to suggest to the court, or to the division--depending upon where power of initiation resides, as determined by the active circuit judges of the court--that a particular case is appropriate for consideration by all the judges. A court may take steps to use the en banc power sparingly, but it may not take steps to curtail its use indiscriminately. Counsel are often well equipped to point up special circumstances and important implications calling for en banc consideration of the cases which they ask the court to decide. If, in the exercise of its discretion under s 46(c), a court denies litigants the privilege of reaching the ear of every circuit judge on the en banc question, there is still no reason to deny them access to the few circuit judges who must act . . . .

> [W]hatever the procedure which is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing en banc, that his case is an appropriate one for the exercise of the power.

And, protection from inconsistent treatment by contemporaneous decisions of different merit panels of the same court of appeals should be nothing less than an equal protection, if not a due process right where now more than $130,000 and the reputations of two attorneys are at stake.[10]

Yet, despite F.R.A.P. Rule 35 and controlling Supreme Court precedent encouraging circuits to resolve intra-circuit conflicts, Robinson and Western Pacific, *supra*, and Civil Aeronautics Board v. American Air Transport, Inc., 344 U.S. 4 (1952), the clerk's office of the Ninth Circuit merely sent Petitioners' motion back exclusively to the same three-member panel, which immediately rejected the motion without submitting it to the full Court despite its first-page heading "This Motion Contains A Suggestion Of The Appropriateness Of Both A Hearing And A Rehearing En Banc, For Distribution And Submission To The Entire Court."[11]

---

[10] The issue here is not whether an appellant should be given *en banc* review of an adverse decision, but whether an appellant is entitled to *equal treatment* by the full court as one similarly situated, where as here two merit panels have decided the same issue in a completely different way.

[11] When statutory and constitutional rights are strongly implicated as here, surely "collegiality" should not be a controlling factor in appellate decision making; See Wald, *Calendars, Collegiality, and Other Intangibles on the Court of Appeals*, in The Federal Appellate Judiciary in the 21st Century at 181 (1989) ("en bancs generate the highest

And, when Petitioners filed their petition with the full Court for a writ of mandamus requiring the clerk to submit the motion *en banc*, the clerk gave the writ petition to the same three-judge panel instead for disposition, reminiscent of scenes from the movie "Ground Hog Day," and the panel proceed to denied the petition for a writ of mandamus as well, without -- once again -- submitting it to the full court or at the very least to the designated motions panel who by circuit rule was supposed to have received and to have considered the merits of such writs.

V. CONCLUSION

For all of the above reasons, Petitioners respectfully pray that this Court will consolidate for review their first petition for writ of certiorari, which is still pending, with this second petition, whose joint consideration, it is respectfully submitted, is required to do justice in this case.

Petitioners further pray that this Court will hear grant their writ of certiorari in both cases, hear the merits of their appeals, and reverse and remand for all of the reasons summarized herein.

Honolulu, Hawaii
August 26, 2002

GARY VICTOR DUBIN
Attorney for Petitioners

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personal tensions on a court . . . losing an en banc is a bitter pill, since the entire court is now on record the other way"); Note, *The Politics of En Banc Review*, 102 Harv. L. Rev. 864, 880 (1989) ("en banc reversals amount to a vote of no confidence in the three-judge panel that already decided the appeal").

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No. 01-1666

In the
Supreme Court of the United States
October Term 2001

GARY VICTOR DUBIN and GREGG YOUNG,

Petitioners,

vs.

BANK OF HAWAII and JOHN CANDON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does F.R.C.P. Rule 11 and due process allow a district judge to sanction attorneys for filing a complaint, dismissed for lack of standing due to ongoing bankruptcy proceedings, if the complaint was filed in reliance upon expert advice of independent bankruptcy counsel and where there exists an apparent conflict among the circuits and unsettled law as to a debtor's standing in district court?

2. Is it a violation of due process for a district judge to impose Rule 11 sanctions against attorneys based upon alleged misconduct in other cases having occurred years earlier outside his personal knowledge, outside his courtroom, and outside his jurisdiction, and to do so without an evidentiary hearing?

3. Is it a violation of due process and Sections 144 and 455 of Title 28 for a district judge to refuse to recuse himself and to sanction an attorney who represented a client who had accused the district judge and his former law firm in a prior state court case of committing legal malpractice?

4. Is it a violation of due process and Rule 11 for a district judge to sanction attorneys who during the "safe harbor" period had agreed to dismiss a complaint without prejudice, but who were prevented from dismissing the complaint with prejudice by their clients who were negotiating a settlement with opposing parties in bankruptcy proceedings instead?

5. Is a $116,862.32 Rule 11 sanction against attorneys for filing a single complaint, without the district judge considering opposing counsel's failure to mitigate their fees, upheld on appeal, so far a departure from the accepted and usual course of judicial proceedings, and the law, and due process, to call for an exercise of this Court's supervisory power?

6. Is a $116,862.32 Rule 11 sanction against attorneys for filing a single complaint, calculated based upon opposing counsel's "block billing" records, upheld on appeal, so far a departure from the accepted and usual course of judicial proceedings, and the law, and due process, to call for an exercise of this Court's supervisory power?

7. Is a $116,862.32 Rule 11 sanction against attorneys for filing a single complaint, calculated based upon opposing counsel's ex parte submission of their billing records to a special master in camera, and never disclosed to the sanctioned attorneys, contrary to F.R.C.P. Rule 53, yet upheld on appeal, so far a departure from the accepted and usual course of judicial proceedings, and the law, and due process, to call for an exercise of this Court's supervisory power?

8. Is a $116,862.32 Rule 11 sanction against attorneys for filing a single complaint, adopted by a district judge from a special master's report without any evidentiary transcripts of the fee proceedings or any evidence therein adduced before him, contrary to Rule 53, yet upheld on appeal, so far a departure from the accepted and usual course of judicial proceedings, and the law, and due process, to call for an exercise of this Court's supervisory power?

9. Is a $116,862.32 Rule 11 sanction against attorneys for filing a single complaint, without inquiry into their ability to pay, yet upheld on appeal, so far a departure from the accepted and usual course of judicial proceedings, and the law, and due process, to call for an exercise of this Court's supervisory power?

10. Is it a violation of due process and Section 455 of Title 28 for an appellate judge, having previously affirmed an attorney's misdemeanor tax conviction, to refuse to recuse himself in a subsequent civil appeal by that same attorney challenging a $116,862.32 Rule 11 sanction against him?

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I. JURISDICTIONAL STATEMENT

The district court entered its "Final Judgment Awarding Rule 11 Sanctions" on January 18, 2000, against Petitioners, attorneys Dubin and Young, representing the plaintiffs in two consolidated cases below, adopting verbatim the "Report of Special Master" filed September 20, 1999.

Young and Dubin filed separate notices of appeal on January 20, 2000, and January 24, 2000, respectively, and Dubin posted a $116,000 cash supersedeas bond, as approved by the district court on February 4, 2000.

The Court of Appeals affirmed the $116,862.32 Rule 11 award in its Memorandum disposition of November 20, 2001, in both consolidated appeals, Case No. 00-15202 (Dubin) and Case No. 00-15157 (Young).

Petitioners filed a timely motion for reconsideration, denied February 7, 2002. On April 25, 2002, the Court of Appeals stayed its Mandate pending this Petition's filing.

This Petition is being filed by Dubin and Young within 90 days of the denial of reconsideration, pursuant to Section 1254(1) of Title 28 and Supreme Court Rules 10, 12(4), 13, 30(1), seeking review and ultimately reversal.

II. AUTHORITATIVE PROVISIONS

The principal governing provisions of law, set forth in the Appendix for the Court's convenience, are as follows:

The Fifth Amendment (due process of law), Section 144 of Title 28 (judicial bias or prejudice), Section 455 of Title 28 (judicial disqualification), Judicial Canon 3(A)(4) (*ex parte* communications), Judicial Canon 3(C)(1)(a) & (d)(iii) & (iv) (appearances of impropriety), and Rules 11 (sanctions) and 53 (masters) of the Federal Rules of Civil Procedure.

III. STATEMENT OF THE CASE

This, it is respectfully submitted, is clearly a case of overwhelming national significance to every practitioner in our federal courts – as it should be to every Justice of this Court as well – the latest advocacy soap opera in an

unfortunate series of out-of-control district court Rule 11 controversies, overwhelmingly in need of attention.

This Petition presents questions of first impression concerning how district judges under the 1993 amendments to Rule 11 should be required to act to maintain the needed, proper balance between and among three distinct, complex, competing system duties:

1. the duty of the district judge to protect against litigation abuses, while preserving the procedural due process rights of those accused of Rule 11 violations;

2. the duty of the advocate to zealously champion a client's cause with enthusiasm and creativity, after due diligently investigating the facts and law, including a duty to argue reasonably for modifications of existing law; and

3. the duty of opposing counsel to mitigate fees by not overworking responses to offending filings, claiming excessive hours, or seeking to create conflicts between opposing attorneys and opposing parties for partisan gain.

This case dramatically illustrates how out of balance such corresponding duties often become unless supervised, especially when a district judge uses Rule 11 to punish a practitioner appearing before him he may not like, functioning as prosecutor, judge, jury, and executioner, despite the due process implications involved, defeating meaningful appellate review through findings of fact entered not to explain his or her decision, but to protect or mask it.

A. The Underlying Lender Liability Dispute

This case has its roots in a dispute between the Bank of Hawaii ("BOH") and Dubin and Young's clients, the Kunimotos, mired in a decade-long financial controversy -- between, Dr. Kunimoto, a prominent Honolulu physician, as borrower, and the BOH as his lender, the most prominent, politically influential institution in Hawaii, a one-party State for decades, whose lawyers dominant local politics.

Dr. Kunimoto and his family, after amassing a net worth of nearly $70,000,000 since late 1971, mostly through

real estate investments, aided in part by more than $25,000,000 borrowed from BOH, began in 1990 to experience cash flow difficulties, which led to charges of loan defaults and counter-charges of lender liability, which culminated in nearly a dozen state court lawsuits, the most important of which, starting in 1994, was Dr. Kunimoto's multi-million-dollar bad faith counterclaim in state court.

At a critical juncture in that case, in 1997, to the unforgiving anger of BOH, Dubin and Young, each a sole practitioner, agreed to represent the Kunimotos on a *pro bono* basis – who eventually had to swallow $500,000+ in fees and costs, opposing BOH who paid opposing attorneys $7,000,000+ to collect debts less than half that size.

Expectations of a fair state court trial for the Kunimotos proved naïve when it was later learned that a specially-assigned trial judge had received a sweetheart mortgage from BOH, below market terms, only weeks before trial, which documentation had at first been disguised as another institution's loan. Efforts to have her disqualified were denied, and efforts to have her removed from the case by the state appellate court were ruled "premature".

Dubin and Young had even located a confidential informant with personal knowledge who could testify that:

1. a trial witness in the state court case had been the trial judge's loan officer a few months before, on whose credibility she had made evidentiary rulings during trial, although that relationship was never disclosed, and

2. at the BOH branch where the confidential informant had worked, BOH rewarded judges and other government VIPs with favorable financial incentives.

This information was immediately given to the local prosecutor, yet was completely ignored.

As expected, the state court trial did not progress well; Dr. Kunimoto was prevented from having the jury consider his multi-million-dollar counterclaim, yet the jury took weeks to render its verdict reducing BOH's claims.

At the start of trial, Dr. Kunimoto, his assets approaching zero, was forced to file for bankruptcy; the automatic stay was immediately lifted allowing the state court trial to proceed even though he lacked funds to pay attorneys or experts, and Candon was appointed his trustee.

Candon, however, immediately sided with BOH; he sought to terminate the Kunimotos' appeal although Dubin and Young offered to brief the appeal without pay; Candon sought to settle with BOH for virtually nothing, dismissing the appeal, leaving his debts nondischargeable.

Understandably, Dr. Kunimoto wanted to seek relief in federal court without Candon's interference; Dubin and Young filed a motion for him to withdraw the bankruptcy reference, together with a companion complaint pursuant, in part, to Section 1334(b) of Title 28, alleging, *inter alia*, various federal wrongful execution and racketeering counts, and a second, separate complaint by Dr. Kunimoto's wife, virtually identical to his, but alleging wrongs in her own right.

BOH and Candon, with virtually identical filings, moved to dismiss both complaints.

On October 7, 1998, the district judge dismissed the complaints, ruling that only Candon had standing.

The Kunimotos appealed, subsequently settling with BOH and dismissing their appeal on February 18, 2000.

B. The Rule 11 Proceedings

DUBIN, who prepared both complaints, did his homework, despite having a zero litigation budget:

1. Dr. Kunimoto's complaint was filed in tandem with the filing by him of a timely a local bankruptcy rule 5011-1 motion authorized by Section 157(d) of Title 28, to withdraw the reference back to the district court;

2. Dr. Kunimoto's complaint was filed with the prior consultation and encouragement of his Honolulu bankruptcy attorney, whom the then bankruptcy judge referred to a the time as an "experienced bankruptcy counsel";

3. Dr. Kunimoto's complaint was simultaneous filed in bankruptcy court – the bankruptcy judge over Candon's objection refusing to order Dr. Kunimoto to drop the lawsuit;

4. the Hawaii Supreme Court had also refused to recognize Candon's claimed exclusive ownership over Kunimoto's state court appellate rights;

5. shortly after the filing of Dr. Kunimoto's complaint, his bankruptcy case was converted to Chapter 7, which Dubin understood to mean that the ownership of his causes of action following filing of his petition reverted back to him;

6. Dr. Kunimoto faced substantial, nondischargeable debts making his case unique; Candon himself in two successive filings admitted there was "a clear minority view" supporting Dr. Kunimoto having standing to sue BOH; and

7. Ms. Kunimoto had not filed bankruptcy; her separate causes of action were not subject to bankruptcy jurisdiction, especially since she was a separate defendant in the state case, and had had her fair trial rights trampled by the events above described, giving her independent rights, apart from her husband, to sue BOH under state law.

In his October 7, 1998, Order, the district judge dismissed both complaints for lack of standing only, ignoring cases from other Circuits, later explaining that advocacy of changes or exceptions to existing Ninth Circuit case law, even to precedent of a merits panel, not even rendered *en banc*, would not to be tolerated in his courtroom.

Anticipating the district judge would dismiss both complaints, BOH and Candon filed for Rule 11 sanctions on September 4, 1998, and on October 2, 1998, respectively.

Earlier, on August 10, 1998, BOH was the first to serve notice of intention to seek Rule 11 sanctions, but its lead attorney was forced to admit, at the August 30, 1999, evidentiary hearing before the special master, Dubin had offered, by August 31, 1998, to dismiss both complaints without prejudice, within the safe harbor period, and the very next day her time sheet later in evidence acknowledged that

that "stated intent" to dismiss had indeed been received by her, and in any event BOH's attorney later during her questioning admitted she had extended the safe harbor period to either August 31 or September 1, 1998, and further that Dubin at the district court dismissal hearing repeated the offer to dismiss without prejudice to everyone.

The correspondence between her and Dubin proves a dismissal without prejudice was formally offered, but could not be filed however without the Defendants' consent, as BOH's counsel knew, as recognized in district courts sanctions order: "the Receiver's motion is, alternatively, one for summary judgment. For this reason, Plaintiffs may not unilaterally dismiss the Complaints".

But neither Dubin nor Young had the ability to dismiss the two complaints with prejudice during the safe harbor period, as their clients had instructed them not to: "my wife and I instructed Mr. Dubin and Mr. Young not to dismiss with prejudice". . . my absolute refusal to dismiss with prejudice . . . offering to withdraw without prejudice."

It was obvious that BOH was only interested in exacting revenge against Dubin and Young for revealing its tampering with the state judiciary, for at the sanctions hearing the district judge was informed that Rule 11 sanctions were only being sought against Dubin and Young and not the Kunimotos, with whom it was reaching a separate settlement in bankruptcy court.

In the district court's December 7, 1998, Rule 11 sanctions order, it stated, based on opposing counsel's unsworn accusations, that Dubin and Young supposedly filed both complaints for the improper purpose of ironically pressuring BOH into accepting a settlement in the related bankruptcy action, and that that conduct by Dubin and Young constituted a "long-standing pattern" of litigious misconduct of theirs in other cases in other jurisdictions that he expressed holier-than-thou determination to deter -- alleged joint misconduct going back several years before Dubin and Young had even known one other!

When later challenged, the district court entered a further order on August 31, 1999, contradicting itself, claiming it had exercised Rule 11 powers only, denying having considered any conduct other than the filing of the alleged frivolous complaints and that Dubin had been given a hearing on all issues, even though the December 7, 1998, hearing transcript shows that hearing began by the court's restricting oral argument to only the safe harbor issue, and without a single evidentiary inquiry held even as to that.

The December 7, 1998, sanctions order referred the determination of the amount of sanctions to a magistrate judge whose reappointment -- and therefore whose independence from the influence of the referring district judge -- was questionable at best at the time; the magistrate was subsequently not reappointed.

The special master first approved $104,464.27 in sanctions without giving Dubin or Young a chance to object. That first, egregious due process denial was, upon motion, corrected, and an evidentiary hearing reluctantly held.

Yet, at a highly abbreviated Rule 53 hearing, not only were Dubin and Young afforded little time for questioning more than 12 lawyers allegedly billing $100,000+ for over 500+ hours, but the special master proceeded in to disregard the law and traditions of fairness:

1. the special master refused to permit Dubin and Young to even brief the relevant legal issues as to the permissible amount of Rule 11 sanctions awardable, saying the district judge did not want it, striking their memorandum of points and authorities submitted for the hearing;

2. the special master refused at first to allow Dubin or Young to file any documentary evidence of their inability to pay any sanctions, striking their individual Declarations filed on August 19, 1999, then permitting those Declarations to be "identified" at the hearing, but publicly doubting their admissibility and never ruling on that issue at the hearing;

3. the special master refused to permit Dubin and Young to subpoena for the hearing the complete billing

records of BOH and Candon's attorneys, even though BOH had submitted heavily redacted invoices with no verifying, contemporaneous time sheets supposedly as a week's notice was insufficient time for them to comply with the subpoenas, yet that same special master, after the hearing, ordered those same billing records to be produced to him in camera on one week's notice, and they were; and

4. the special master, after the hearing, made his factual determinations and produced his report based upon those secret, ex parte, in camera billing submissions received by him under seal from BOH's attorneys, and based his report, in part, upon those sealed records, the Special Master, functioning as fact-finder, prefacing his Report by frankly acknowledging that he was basing his findings in part on those "unredacted billing statements" only he was allowed to see, thus incapable of being challenged or rebutted by Dubin or Young, or even questioned on appeal.

5. the special master, although Rule 11 states sanctions are to be awarded only for expenses "incurred as a direct result of the violation," awarded the vast majority of fees for work done on issues unrelated to what was actually found by the district court to have been frivolous (standing issue only), which was addressed in *less than two pages* in BOH's moving memorandum seeking dismissal and *in less than three full pages* in Candon's moving memorandum;

6. the special master, although the moving papers sought sanctions solely for the filing of the complaint, the vast majority of the fees awarded had to do with matters the district court had never held to be either frivolous or filed for an improper purpose, such as for procedural motions concerning on which Dubin and Young prevailed; or for work performed not directly reflected in or inferable from papers in the court's file, such as time spent interviewing and conferring with clients, analyzing documents, formulating strategies, and conferring and coordinating with co-counsel, including telephone discussions with other counsel; for work reflected by BOH time entries admitted altered for the Rule 11 hearing; many entries in invoices

submitted by both BOH and Candon covered voluminous work performed by persons who never signed any documents, never attended hearings, nor were ever seen to be working on the cases; for work by such invisible "second chairs"; and much of BOH's billings "lumped" daily tasks together in "block billing" without differentiating time spent;

7. the special master, contrary to Rule 53(e)(1), did not file a transcript of his evidentiary proceedings nor any evidence and exhibits with his Report; and

8. the special master in his report, filed September 29, 1999, makes no mention of evidence adduced at the fee hearing, relying instead upon written ex parte submissions, in camera, sealed, from BOH's attorneys, and therefore the subsequent order adopting the special master's report, filed January 5, 2000, by the district judge, did not even consider any of the evidence adduced at the fee hearing, rendering the district judge's "oversight" unreliable and untrustworthy, and wholly without evidentiary support -- a complete sham.

C. The Recusal Motions

On December 22, 1998, Dubin and Young filed a motion to disqualify the district judge, Dubin's moving declaration citing numerous instances of personal bias and prejudice evidenced against him for more than ten years in a dozen or more cases in which the same district judge had presided, and one case in particular where Dubin represented a former client of the district judge who made allegations of legal malpractice against him and his former firm, and citing his remarks at the December 7, 1998, sanctions hearing, lambasting Dubin's credibility and personality for always portraying himself "as a victim. You're always the victim, Mr. Dubin. Unfortunately, you are not a victim unless you are a victim of your own actions."

Days later the district judge called an emergency hearing, scolded Dubin, childlike, for, among other alleged personal failings, again always supposedly portraying himself "as a victim," while agreeing, although not recalling ever being sued for legal malpractice, "had there been some

malpractice claim against me that I was unaware of and you prosecuted that claim, I think that it would be incumbent upon me immediately to recuse myself, Mr. Dubin."

The disqualification issue was transferred to the late Judge Martin Pence, who, without a hearing, on December 30, 1998, denied disqualification even though case records were retrieved by Dubin proving legal malpractice claims made against the district judge, Judge Pence dismissing on the grounds the malpractice claims technically were really more directed at the district judge's then law firm in which he was a named partner and the attorney he supervised in the case, notwithstanding the district judge's early promise to "immediately" recuse himself were he to learn that there had been such past allegations of legal malpractice.

Since special masters are governed by the same ethical rules as judges, and this special master was also a magistrate judge, he was presented with a disqualifying declaration for cause by Dubin for having accepted and acted upon ex parte evidence of BOH's billing records, yet he never even thought to respond, thus automatically causing his disqualification weeks before his report was ever even issued were the ethical laws to be enforced.

Similarly, since the district judge could not pass upon the correctness of the special master's report unless he too reviewed the ex parte, in camera, BOH submissions under seal, a declaration disqualifying him for that reason was also filed assuming to do his job he would have to review that secret evidence as well, which he also ignored.

Just prior to oral argument before the Court of Appeals, Judges on the merits panel were announced; upon learning that the Judge O'Scannlain was a member of the panel, Dubin moved for his recuse for the following reasons:

Dubin had been bench tried and convicted of failing to fail federal income tax returns by the Judge Real while a visiting district judge in Hawaii in late 1994, and the misdemeanors were affirmed by a panel in late 1995 consisting of Judges Poole, B. Fletcher, and O'Scannlain.

Although well aware of the conventional view that a judge is not disqualified from hearing a civil matter if presided over a prior criminal matter involving the same party, the reason Dubin continues to believe that Judge O'Scannlain ought to have recused himself from deciding his Rule 11 appeal is because the issue of the prior affirmance of Dubin's misdemeanor appeal by a merits panel in which Judge O'Scannlain sat was in part a major issue here concerning the refusal of the district judge to disqualify himself for bias and prejudice, in part the result of his knowledge and behind-the-scenes participation in Dubin's earlier misdemeanor convictions.

Specifically, just prior to Dubin's scheduled misdemeanor trial, Judge Real, hand-picked Dubin's case, taking it away on the basis of seniority from the magistrate judge assigned by standing order to try all such cases, ordered Dubin arrested while in the hospital, concluding on the basis of only later discovered ex parte hearsay relayed to his law clerk by the prosecutor that Dubin was supposedly faking his illness, presumably to avoid him, had Dubin taken from the hospital, escorted by U.S. Marshals to his courtroom, and tried while without counsel, without his tax or case files, while jailed and without his witnesses, even refusing to consider written evidence in the pretrial record that the IRS had written Dubin acknowledging that he had had no filing requirement in the years in question due to business losses, upon which advice he had in writing relied.

And, while incarcerated, Dubin was contacted, while at a federal prison camp, by Judge Poole's office manager, whom Dubin had previously never known, warning him according to her Judge Poole had become senile, that she had mention it to then Chief Judge Wallace who was planning to take action unless Judge Poole accepted senior status later that year, and Dubin should be concerned because a district court judge from Hawaii had been poor mouthing Dubin to her boss.

It was, therefore, not the affirmance of Dubin's misdemeanor convictions by the merits panel in which

Judge O'Scannlain sat, that caused Dubin to request another appellate judge.

What was relevant was first, by a simple logical process of elimination, Dubin was and remains convinced that it was the same district judge below, sitting on Ninth Circuit executive committees at the time, who interfered with the fair consideration of his earlier misdemeanor appeal, and, second, that the result below in this new case was only another manifestation of that same bias and prejudice.

Given the unique circumstances of Dubin's misdemeanor conviction, and the fact that his credibility was necessarily one of the issues on appeal in this Rule 11 case since the district judge's announced findings were expressly based upon his "long-standing" character assessment of Dubin, Dubin believed that it would be unfair to now have him judged again, and his Rule 11 appeal decided, by a Circuit Judge who was on the merits panel which affirmed his conviction and who there concluded that "Dubin obstructed justice," a conclusion not shared later by the disciplining authorities of both the Hawaii Supreme Court and the California Supreme Court who reviewed the record of that conviction with a thoroughness not shown by the 1995 panel on which Judge O'Scannlain sat.

Nevertheless, Dubin's recusal motion was summarily denied on October 31, 2001, without comment, including by Judge O'Scannlain, who later would echo the district judge's personal dislike of Dubin in his dissent from the panel's April 25, 2002, otherwise appreciated order staying the mandate.

IV. LEGAL ARGUMENT

Introduction

Although the Court of Appeals in its unpublished Memorandum felt apparently compelled to at least openly acknowledge "that the award in this case is quite large for a Rule 11 penalty," curiously it never once thought to mention the dollar amount, as if itself too embarrassed to do so.

The fundamental flaw that runs throughout the Memorandum disposition, it is respectfully submitted, is that it merely rubber-stamped the findings of the district judge, ignoring all issues of bias and prejudice, and never once addressing the question whether the findings were correct.

By contrast, in cases such as this, where there is such obvious extreme hostility displayed in the district court record between trial counsel and district judge, panels in most Circuits, as well as in the Ninth Circuit heretofore, have for good reason applied a more stringent review standard:

> [A] troublesome aspect of a trial court's power to impose sanctions . . . is that the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed. [Mackler Products, Inc. v. Cohen, 146 F.3d 126, 128 (2d Cir. 1998)]

This is especially true, as other Ninth Circuit panels have thankfully recognized, concerning Rule 11 awards:

> [O]ur system of litigation is an adversary one, and that presenting the facts and the law as favorably as fairly possible in favor of one's client is the nub of the lawyer's task. Judges therefore should impose sanctions only in the most egregious situations, lest lawyers be deterred from vigorous representation of their clients. [United National Insurance Co. v. R&D Latex Corporation, 242 F.3d 1102, 1115 (9th Cir. 2001)].

This is considered especially important with respect to the dollar amount of any Rule 11 sanction, other Ninth Circuit panels having always scrutinized whether opposing counsel themselves acted reasonably, or "piled on":

> When the sanctions award is based upon the attorney's fees and related expenses, an essential part of determining the

> reasonableness of the award is inquiring into the reasonableness of the claimed fees. Recovery should never exceed those expenses reasonably necessary to resist the offending action. [In re Yagman, 796 F.2d 1165, 1184-1185 (9th Cir. 1986)]

A. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, where there is a conflict among circuits, the law is unsettled, and counsel relies on independent expert legal advice.

Section 157(d) of Title 28 and local bankruptcy rule 5011-1 provide for the return of non-exclusive jurisdiction from bankruptcy court to district court in which it sits, which is what Dubin and Young tried to do, with the advice and approval of Dr. Kunimoto's experienced bankruptcy counsel. It was the district court's refusal to withdraw the reference that created the lack of standing issue in the first place.

In exceptional circumstances, there clearly exists precedent for allowing a Debtor *non*exclusive control with his trustee over his causes of action, where, for instance, as here, the personal obligation of Dr. Kunimoto remained to pay nondischargeable state and federal taxes, and because of the then unresolved nature also of BOH's nondischargeability claims; see, e.g., In re Reich, 54 B.R. 995, 1002 (E.D. Mich. 1985), Yadkin Valley Bank & Trust Co. v. McGee, 5 F.3d 750 (4th Cir. 1993), In re Silverman, 37 B.R. 200, 201 (S.D.N.Y. 1982), Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979), In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7, 10 (1st Cir. 1993).

Moreover, at the time of the dismissal and that sanctions hearings, Dr. Kunimoto's bankruptcy had been converted to Chapter 7, and many courts have held that upon conversion to Chapter 7 prior to any Chapter 11 plan confirmation, the original date of filing controls, whereas the district court in its dismissal order, ruling that his claims arose *both pre-petition and post-petition*, erroneously assumed that Dr. Kunimoto was still in Chapter 11; see, e.g., Casey v. Hochman, 963 F.2d 1347 (10th Cir. 1992)

(where debtor developed a device during the interim between his original filing and the conversion of his case from Chapter 11 to Chapter 7, the device, its patent, and the income licensing agreements were held his own property).

And, with regard to Ms. Kunimoto, her claims in her case were even more clearly and conclusively *hers*, not only due to the conversion of her husband's bankruptcy to Chapter 7, potentially as to her "derivative claims," but many of her claims were *individual* and not "derivative," and according to Hawaii law, which governs what is her separate property, wives are allowed to sue separately for torts committed against them whether "derivative" or not, Brown v. KFC National Management Co., 82 Haw. 226, 241, 921 P.2d 146, reconsideration denied, 82 Haw. 360, 922 P.2d 973 (1996). The district judge never understood that.

Similarly, it remains an open question whether in such circumstances emotional distress claims, for instance, as pled by both Dr. and Ms. Kunimoto, might not be the property of a Debtor's estate on public policy grounds, Sierra Switchboard Co. v. Westinghouse Electric Corp., 789 F.2d 705, 709 n.3 (9th Cir. 1985); and with respect to corruption claims, see Davis v. Crush, 862 F.2d 84, 92 (6th Cir. 1988) ("to uphold the district court's imposition of Rule 11 sanctions in the instant case would operate to chill the bringing of facially valid civil rights suits in federal court, a consequence that Rule 11 was never intended to promote").

Nevertheless, the panel concluded that "the district court did not abuse its discretion finding that the complaint was 'both baseless and made without a reasonable and competent inquiry,'" choosing to rely on its own legal acumen by speculatively second-guessing a Fourth Circuit case, Yadkin Valley Bank & Trust Co. v. McGee, 5 F.3d 740 (1993) (e.g.: "presumably, standing was not raised by the lawyers in that case or there was trustee consent to the suit"), as well as a Sixth Circuit case similarly decided, Reich v. Burke, 54 B.R. 995 (E.D. Mich. 1985).

By so doing, the panel missed the point: it was not *its* rationale, right or wrong, that the district judge used to

find that there was no basis for the complaint, but the district judge held instead that in his courtroom "the Ninth Circuit controls," and that championing a minority position in another Circuit with him is justification enough for Rule 11 sanctioning; see his November 23, 1998, Order denying reconsideration: "Reich adopts the minority position that a trustee can be sued without the bankruptcy court's permission. Id. at 997. This holding is neither binding on this court nor consistent with the law in this jurisdiction."

Even Candon's counsel, in his reply memorandum filed November 19, 1998, never questioned the fact that Kunimotos' standing argument, when raised in defense of dismissal, did indeed have a following in the case law, complaining only that it was merely not the majority view: "Reich represents a clear minority position and [Dubin] did not cite or discuss the enormous weight of contrary authority. This failure is particularly inexcusable in light of the Kashani decision of the Ninth Circuit Bankruptcy Appellate Panel, which follows the majority rule".

B. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, where it is based upon alleged misconduct committed several years before, outside a district judge's personal knowledge, outside his courtroom, and outside his jurisdiction, and without even an evidentiary hearing.

The panel concluded "the district court had ample justification for finding that the complaints were filed for the improper purpose of 'harassing and pressuring the Defendants to settle other pending litigation,'" that "the complaints largely repeated claims that had been settled in state court," and for "the parade of motions for reconsideration, for striking orders, and for disqualifying the judge and the special master."

The panel, however, overlooked that the basis for the district court's harassment finding in its December 7, 1998, order granting sanctions, was not actions by Dubin and Young in the existing cases before him, but in *other* cases in *other* courts before *others* who made no such

sanctioning awards -- in the bankruptcy court, for example, and in the Hawaii state courts years earlier – in which the district judge had no personal involvement or personal knowledge of whatsoever – thus rendering his "inherent power" sanctioning in this case constitutionally improper under the guise of Rule 11; to opine in his view, as the district judge did, without even the pretext of an evidentiary hearing, as to the merits of what he thinks happened in cases outside his court, outside his jurisdiction, as much as six years earlier clearly violates procedural due process.

This Court has wisely cautioned that "[b]ecause inherent powers are shielded from democratic controls, they must be exercised with restraint and discretion," Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980), and surely that applies to Rule 11 sanctions used in the same way.

As District Judge Scott, in his often cited opinion in NASCO, Inc. v. Calcasieu Television and Radio, Inc., 124 F.R.D. 120, 138-139 (W.D. La. 1989), explained, Rule 11 (including the more recent amendments to Rule 11) does not reach conduct outside the presence of the reviewing court, and thus a $116,862.32 Rule 11 dollar award based upon a "pattern" of misconduct in other jurisdictions is not even an appropriate Rule 11 sanctioning in the first place: "we find and agree with the parties to this sanction proceeding that Fed.R.Civ.P. 11 does not furnish a basis for the consideration of the sanctionable acts alleged".

"A court must . . . exercise caution in invoking its inherent power, and must comply with the mandates of due process," warned Associate Justice White, for instance, in Chambers v. NASCO, Inc., 501 U.S. 32, 50, 112 S.Ct. 27, 115 L.Ed. 2d 27, 48 (1991); see also, for the need for such procedural due process safeguards, Edmunds v. Chang, 365 F. Supp. 941 (D. Haw. 1973), reversed on other grounds, 509 F.2d 39 (9th Cir. 1975); Eash v. Riggins Trucking, Inc., 757 F.2d 557, 570 (3d Cir. 1985) (due process requires "prior notice and some occasion to respond").

C. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, when imposed by a district judge who was charged with legal malpractice by a former client in a civil action where his former client was represented by that attorney.

"Personal bias," is an attitude toward a party by a judge "that is significantly different from and more particularized than the normal common general feelings of society at large," Mimms v. Sharp, 541 F.2d 415, 417 (3rd Cir. 1976), where the offending judge has "an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes", United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980). Even where the question of recusal is a close one, the balance tips in favor of recusal; Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995).

Not only, it is submitted, are all of the Section 144 elements requiring recusal present here in abundance. The lesser standard of Section 455 of Title 28 is also clearly applicable, for the district judge's impartiality on this record should have been at least reasonably questioned by the panel, which however ignored the issue completely in its Memorandum disposition, although fully briefed before it.

And, under Section 455, disqualification does not depend on actual bias or prejudice, but is designed to avoid even appearances of partiality, Liljeberg v. Health Services Acquisition Corporation, 486 U.S. 847 (1988); Yagman v. Republic Insurance, 987 F.2d 622 (9th Cir. 1993).

Moreover, actual bias need not be present before disqualification is mandatory, Matter of Horton, 621 F.2d 968 (9th Cir. 1980). The standard is an objective one.

Here, the district judge himself admitted at the December 22, 1998, sanctions hearing, with failing memory, that "had there been some malpractice claim against me that I was unaware of and you prosecuted that claim, I think that it would be incumbent upon me immediately to recuse myself, Mr. Dubin," yet when certified copies of

documentary evidence was subsequently retrieved from state court files, the district judge nevertheless refused recusal on the basis that it was only his law firm and the junior attorney he was directing, working under him, with whom supposedly his former client was really mostly upset.

D. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, when during the "safe harbor" period an attorney offers to withdraw a challenged pleading without prejudice, but is unable to do so with prejudice, as requested, due to receiving contrary instructions from his or her clients.

The panel once again merely rubber-stamped "discretionary" findings of the district judge that Dubin's "alleged offers" within the safe harbor period to dismiss the complaints without prejudice supposedly "were not sincere proposals but rather disingenuous attempts to force settlement" while Dubin "continued to speak equivocally about the possibility of withdrawing after the safe harbor period ended."

The record shows, to the contrary, that there was nothing "insincere" or "disingenuous" or "equivocal" in that proposal, which was clearly understood as unequivocal by BOH's lead counsel, and which was just as clearly rejected unequivocally by her; see letter from Ms. Leonard to Mr. Dubin dated September 1, 1998:

> You called early this afternoon to inform me that you are withdrawing the Complaints in the above-referenced actions. As we have discussed, Fed. R. Civ. P. 41 allows a unilateral notice of withdrawing a complaint only if there has been no answer or motion for summary judgment. In this case, all Defendants have filed for summary judgment, therefore Plaintiffs must proceed by stipulation or motion. I have prepared a stipulation for dismissal with prejudice, for your signature (enclosed). . . . [T]he Bank cannot agree to stipulate to dismiss this

> matter without prejudice. . . . If you choose not to sign the enclosed stipulation and do not otherwise take immediate steps to dismiss the Complaints [with prejudice], we will proceed with the Rule 11 motion. [Bracketed materials added]

Indeed, Ms. Leonard admitted before the special master that Dubin had in fact made that offer to dismiss both complaints without prejudice within the safe harbor period, as her time sheet for September 1, 1998, noted, that that "stated intent" to dismiss had been received by her, but could not however be achieved without her consent. Yet, the panel, contrary to the printed record, mistakenly, inversely concluded, in Alice-In-Wonderland fashion, that Dubin was somehow responsible for the cases continuing.

Dubin, however, had no ability, moreover, to dismiss with prejudice during the safe harbor period, as the Kunimotos refused in writing -- in filed Declarations -- to allow Dubin and Young to do so ("my wife and I instructed Mr. Dubin and Mr. Young not to dismiss with prejudice") ("my absolute refusal to dismiss with prejudice . . . offering to withdraw without prejudice").

Ms. Leonard well knew and well understood this ethical and practical limitation on Dubin and Young's authority, but in her testimony before the special master -- under cross-examination – completely misunderstood, embarrassingly, how the safe harbor provisions in the 1993 Rule 11 amendments are supposed to work:

> Q. [by Dubin] Are lawyers able to dismiss cases if their client refused to dismiss? * * * * [objection overruled]
>
> A. [by Leonard] probably not. I don't believe they could and I don't think that the sanctions were for failing to do it, failing to dismiss with prejudices, it was for filing the frivolous complaints in the first place.

The panel further mistakenly faulted Dubin for failing "to file any withdrawal motion with the court or send any proposed withdrawal documents to the bank," overlooking the fact that Dubin's clients had specifically instructed him not to do so with prejudice, and with respect to criticizing Dubin, with such ungenerous hindsight, for not having filed a motion with the district court to dismiss without prejudice, the panel overlooked that BOH's motion to dismiss was then pending, which would in any event have been heard first, and Dubin did in fact ask the district court in briefing that motion and on the record of that hearing to dismiss the two complaints without prejudice, as there was no need for another motion: "MR. DUBIN: We would ask the Court to dismiss without prejudice. That has been our intention."

The panel, looking it seems almost everywhere to find whatever fault it could muster, also concluded that "the alleged offer [to dismiss without prejudice] was made only to the bank and therefore has no bearing on the motion for sanctions brought by the trustee," repeating as it seemed to do virtually every unsupported allegation found in the opposition papers.

The panel, however, overlooked the fact Candon's counsel was copied on all correspondence to Ms. Leonard, who acted as spokesperson for all Defendants, and that he had been formally notified of Dubin's dismissal-without-prejudice offer and of the Kunimotos' desire and firm proposal to dismiss without prejudice -- not only at the dismissal hearing itself, but also weeks before the motions to dismiss were even heard, or the two complaints dismissed, or Candon's motion for sanctions even filed, when he was served with Plaintiffs' Joint Memorandum, filed September 23, 1998, opposing dismissal at its conclusion:

> 1. Plaintiffs have been led to believe by all parties that a global settlement substantially in the form proposed in Dr. Kunimoto's Amended Plan of Reorganization, with some expected fine tuning, is very near. Certainly, Judge Lloyd King has encouraged the parties

> to reach such a global settlement, and to meanwhile suspend all litigation activity, and for that purpose has calendared the forthcoming October 15, 1998, hearing.
>
> 2. For that reason, Plaintiffs proposed at the end of last month either a continuance of these proceedings until after the October 15, 1998, hearing before Judge Lloyd King, or a dismissal of the two complaints herein now without prejudice – with prejudice when a Plan of Reorganization is agreed to, hopefully shortly.
>
> 3. Plaintiffs invite the cooperation of all parties in this final good faith effort to bring this decade long litigation to an end [n.10.].
>
> [n. 10: Plaintiffs would have dismissed these two complaints pursuant to Rule 41(a) already, prior to the lapse of any Rule 11 21-day notice period, as explained in Exhibit 7 hereto, avoiding further effort in these actions for everyone including the Court, given the excellent prospects now of a global settlement, were it not for Fidell's labeling of his motion one alternatively for summary judgment, thereby blocking any such unilateral dismissal, and Ms. Leonard's refusal to allow a dismissal without prejudice.]

The panel's decision has created a split among Circuits, who treat such "safe harbor" offers differently; *e.g.*:

"A party is not required to both withdraw its position and make a candid acknowledgment to avoid Rule 11 sanctions; withdrawal alone is sufficient," Hockley v. Shan Enterprises L.P., 19 F. Supp. 2d 235 (D. N.J. 1998); "Plaintiffs rightly note that Rule 11 requires only that the nonmovant 'withdraw' the paper, not that this be done with prejudice . . . this reflects that the purpose of the safe-harbor provision is to avoid holding a hearing and imposing

sanctions," Dee-K Enterprises, Inc. v. Heveafil SDN. BHD, 177 F.R.D. 351, 354-355 (E.D. Va. 1998).

"Plaintiff's October 8, 1996 offer to voluntarily dismiss the action with prejudice, should be construed as an informal withdrawal pursuant to Rule 11. Accordingly, Rule 11 sanctions are not warranted," Succession Picasso v. Spedding, 1997 WL 65911, *2 (S.D.N.Y. 1997); see, e.g., PhotoCircuits Corp. v. Marathon Agents, Inc., 162 F.R.D. 449 (E.D.N.Y. 1995) (notice that the complaint would be withdrawn held sufficient); Nagle Industries, Inc. v. Ford Motor Co., 173 F.R.D. 448, 459 (E.D. Mich. 1997):

> Nagle, however, prior to the expiration of the twenty-one days provided under Rule 11's safe harbor provisions, both informally and formally, offered to withdrawal its challenged unfair competition claims. In an April 8, 1997 letter, Nagle's counsel offered to dismiss those claims without prejudice. In light of Ford's unwillingness to agree to a dismissal without prejudice, on April 15, 1997, Nagle sought the court's permission to allow it to voluntarily dismiss those claims without prejudice under Fed.R.Civ.P. 41(a)(2) [as Dubin did at the dismissal hearing here]. Nagle argues that its actions satisfy Rule 11(c)(1)(A)'s requirement that the challenged claim be 'withdrawn or appropriately corrected,' and therefore it is entitled to protection from Rule 11 sanctions under that rule's safe harbor provisions. The Court agrees. [Bracketed materials added]

E. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, where a special master and the district judge did not deduct for opposing counsel's failure to mitigate their fees.

"Piling on" has always been seen to be as bad as -- if not worse behavior than -- Rule 11 violations; see, *e.g.*, Aetna Casualty & Surety Co. v. Fernandez, 830 F.2d 952,

956 (8th Cir. 1987) ("it seems that if the law was so clear that plaintiff's case was so weak, it should not have required much research or effort on the part of defense counsel to defend successfully"); Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1491 (8th Cir. 1994) ("on the face of it, there is something very inconsistent with the assertion plaintiffs filed a patently frivolous complaint meriting sanctions under Rule 11 and contending that it took 279.10 or even 179.10 hours of legal work [much less than here] in order to reveal what defendants contend is obvious").

Should it take $116,862.32 -- and more than 500 hours of lawyering from more than a dozen attorneys -- to defeat a single complaint allegedly so frivolously lacking in rudimentary standing?

Yet, the panel did not even address that fully briefed issue on appeal, despite noting as it had to "the magnitude of the award," which issue was also completely ignored by the special master who concluded in his report, contrary to the accepted and usual mitigation requirements, with a contrary, but-for logic: "Messrs. Dubin and Young created this paper war. They may not now cry foul as they fall victim to the battle."

F. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, where the amount is based on "block billing" by opposing parties.

BOH's redacted billing records represent "block billing" which have been universally rejected by federal courts; see, e.g. In re Automobile Warranty Corp., 138 B.R. 72, 76-77 (Bk. D. Colo. 1991) ("[L]umping is a] practice universally disapproved . . . it prevents the Court from determining whether individual tasks were expeditiously performed within a reasonable period of time ['the cases are legion']"). In Houghton v. Sipco, Inc., 828 F. Supp. 631, 643-644 (S.D. Iowa 1993), "lumpies" were rejected altogether ("I consider this so-called documentation inadequate and will disallow all of those unanalyzed allocation of hours").

All other Courts of Appeals similarly have consistently rejected block billing. In Robinson v. City of Edmond, 160 F.3d 1275, 1284-1285 (10th Cir. 1998), the Tenth Circuit explained: "The use of billing practices that camouflage the work a lawyer does naturally and quite correctly raise suspicions about whether all the work claimed was actually accomplished or whether it was necessary. This concern is particularly important in a situation where a party is seeking to have his opponent pay for his own lawyer's work." See also In re Tak Communications, Inc., 154 B.R. 514, 519, 526 (W.D. Wisc. 1993) ("block billing makes it impossible to ascertain the amount of time spent").

Once again, the panel did little more that swallow whole whatever the special master *said he did* as within his "discretion," confusing concern over "block billing" with whether time entries were made contemporaneously: "Aware of this [block billing] concern, the special master . . . found for the most part the unredacted records . . . were transcribed on the same day as the services were performed," even thereby upholding the special master's secret review of the fee records without giving Dubin or Young a chance to see them and to rebut them.

G. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights and F.R.C.P. Rule 53, where the amount is based on a special master's ex parte review of an opposing party's billing records which are concealed from that attorney.

All such ex parte communications are ethically proscribed for magistrate judges and special masters; Canon 3(A)(4), Code of Conduct For United States Judges; Guenther v. C.I.R., 939 F.2d 758 (9th Cir. 1991) (ex parte memo required reversal, violation of due process rights); United States v. Van Griffin, 874 F.2d 634 (9th Cir. 1989) (ex parte report improperly retained by magistrate, creating appearance of bias); see also United States v. Thompson, 827 F.2d 1254, 1258 (9th Cir. 1987) ("truth will most likely

be served if the decisionmaker – judge or jury – has the benefit of forceful argument by both sides").

Nonetheless, the special master freely accepted that ex parte submission of BOH billing records, which formed in large part the basis of his $116,862.32 Rule 11 award.

Once again, although the issue was fully briefed; the panel ignored that issue entirely, as if the evidentiary requirements imposed on special masters by F.R.C.P. Rule 53 were exempt from procedural due process of law; nor did the panel explain how such a secret review could yield itself to effective appellate scrutiny in the absence of any daylight.

H. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights and F.R.C.P. Rule 53, where the amount is adopted by the district court in the absence of any evidentiary transcripts or any evidence therein adduced.

Contrary to the specific requirements of Rule 53(e)(1), under which the district judge referred the matter on July 16, 1999, to his magistrate as special master, the special master never filed with his report the transcripts of the evidentiary hearing although the providing of transcripts was specifically requested by Dubin in writing in a timely manner on August 15, 1999, as required by Rule 53(c) ("the master shall make a record of the evidence offered and excluded"), which was prior to the evidentiary hearing, and accordingly the hearing was taped, but the transcripts were only completed *after* his report was read and adopted by the district judge, nor did he attach to his report Dubin and Young's August 19, 1999, declarations of inability to pay.

This glaring deficiency, directly contrary to law, also went unmentioned in the panel's Memorandum disposition.

I. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights, where the amount is recommended by a special master in his Rule 53 report, and adopted verbatim by the district court, without serious inquiry into the attorney's ability to pay.

In the Ninth Circuit the "ability to pay" is only "one factor" in such a deterrence assessment, Matter of Yagman, 796 F.2d 1165, 1185 (9th Cir.), *amended on other grounds on rehearing denial*, 803 F.2d 1085 (1986) – a test substantially less stringent than that found in all other Circuits, to the obvious prejudice of Dubin and Young here, whose panel thought nothing apparently as a result of forcing them into bankruptcy, or out of business; *e.g.*:

1. the Third Circuit directs its district courts to consider ability to pay as a "particularly relevant equitable factor" in mitigation in the calculation of such an award, Doering v. Union County Board of Chosen Freeholders, 857 F.2d 191, 195-196 (3rd Cir. 1998) (affirming the imposition of sanctions, but vacating the amount of monetary sanctions imposed and remanding for further evidence, noting plaintiff's attorney was [as here] a sole practitioner who had requested mitigation in the district court [as here] and stated at oral argument [as here also in writing] he had limited funds, but the record was devoid [as here] of any evidence relevant to such inquiry [here the special master refusing even to hear such evidence]);

2. the Fourth Circuit directs its district courts to consider "ability to pay," and a Rule 11 "monetary sanction" imposed without considering the offender's ability to pay automatically "would constitute an abuse of discretion. A court should refrain from imposing a monetary award so great that it will bankrupt the offending parties or force them from the future practice of law," In re Kunstler, 914 F.2d 505, 524 (4th Cir. 1990), *cert. denied sub. nom* Kunstler v. Britt, 499 U.S. 969 (1991);

3. the Fifth Circuit reduces the amount of Rule 11 awards of its district courts based on the offender's annual earnings, Coats v. Pierre, 890 F.2d 728, 734 (5th Cir. 1989), *cert. denied*, 498 U.S. 821 (1990) (finding a $20,000 award excessive where the plaintiff earned between $22,200 and $28,657 per year, and remanded with directions to reduce the award to $1,800, which was less than one tenth of his annual earnings [Dubin and Young here can assure the

Court that their combined annual earnings are not in the million-dollar range – or anywhere near $116,000 times 10]);

4. the Sixth Circuit requires a party's financial status be thoroughly considered by its district courts before Rule 11 monetary sanctions are issued "in order to protect a party from punitive awards in favor of the deterrent purposes of Rule 11" only, and specifically its district courts are "required to make an inquiry into an attorney's ability to pay sanctions in order to prevent Rule 11 from being used 'as a vehicle to drive an attorney out of practice,'" even if the award results in only "a fraction of the actual and reasonable fees requested," Runfola & Associates, Inc. v. Spectrum Reporting II, Inc., 88 F.3d 368, 375 (6th Cir. 1996); Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor, 875 F.2d 1224, 1230 (6th Cir. 1989);

5. the Seventh Circuit directs that its district courts must consider an offending attorney's assets relevant to the fashioning of a monetary Rule 11 award, Brown v. Federation of State Medical Boards of the United States, 830 F.2d 1429, 1439 (7th Cir. 1987); Munson v. Friske, 754 F.2d 683, 697 (7th Cir. 1985) (fee awards are equitable matters permitting courts "to consider the relative worth of the parties" [BOH is the largest Bank in Hawaii]);

6. the Eighth Circuit holds its district courts "must consider financial ability in the award of sanctions" in Rule 11 cases, vacating in instances where [as here] its district courts fail to do so, Baker v. Alderman, 158 F.3d 516, 529 (8th Cir. 1998) (upon remand, "the district court should permit supplementation of the record with financial affidavits sufficient to permit consideration of financial ability [which was expressly denied here]); and

7. the Tenth Circuit requires its district courts to consider ability to pay Rule 11 monetary sanctions because Rule 11 sanctions are considered analogous to punitive damages, White v. General Motors Corp., Inc., 908 F.2d 675, 684-685 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) (remanding to permit offending parties to supplement record with more financial information, even though

criticizing their earlier statements in the record as too "general and unhelpful").

The panel dismissed any such inquiry, upholding the special master's "ruling, finding the declarations filed not probative because they failed to account for appellants' assets and liabilities"; the record suggests otherwise:

From August 19, 1999, filed Declaration of Dubin: "my net worth is approximately a minus $3,000,000; . . . with [son's medical bills] alone exceeding $435,000, . . . [returning to Honolulu in late 1996 having lost] all of my life savings . . . with $262 in my pocket, no office equipment, not even a suit or tie to go to court with, no automobile for two years, and still no secretary . . . my house in foreclosure as the two mortgages have not been paid in nearly four years . . . ; additionally, the IRS has made a now totaling more than $2,000,000 assessment against me personally for allegedly owing back income taxes for 1985 through 1988 [all thanks of course to Judge Real], which is still in the IRS objection process;" and

From August 19, 1999, filed Declaration of Young: "part-time . . . semi-retired . . . gross income for 1998 was $31,282. After deducting office expenses of $16,370, your declarant's net income was a mere $14,912."

J. A $116,862.32 Rule 11 sanction is unjustified, and in violation of an attorney's due process rights and Section 455 of Title 28, when upheld by an appellate panel, a member of which previously affirmed the attorney's related misdemeanor tax conviction.

In the Ninth Circuit, a judge is not disqualified from hearing a civil matter if he or she presided over a prior criminal matter involving the same party, Barnes v. United States, 241 F.2d 252 (9th Cir. 1956), although the Barnes decision is general in nature and has met with criticism elsewhere and has often been rejected, Illinois v. Lagardo, 82 Ill. App. 2d 119, 226 N.E. 2d 492 (1967), and it is submitted it is now outdated.

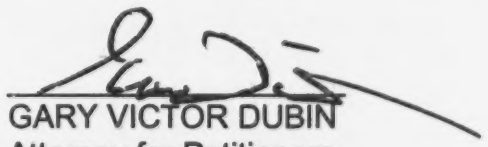
The reason why Dubin felt compelled to request that Judge O'Scannlain recuse himself, which he refused however to do, was because the issue of the prior upholding on appeal of his misdemeanor tax conviction by a merits panel in which Judge O'Scannlain sat is a part of one major issue in this current Rule 11 appeal: the refusal of the district judge to disqualify himself for bias and prejudice, was, it is believed, *inter alia*, the result of his knowledge of and believed behind-the-scenes participation in Dubin's earlier misdemeanor conviction and the 1995 panel's affirmance.

The district judge's statements "victim" remarks in the record below clearly reflect that bias and prejudice, which were part of the content of Dubin's disqualification motion filed with the district judge. Similarly, at the earlier disqualification hearing before the district judge on December 22, 1998, that issue was also dominant.

How, therefore, could Judge O'Scannlain ethically sit on a civil appeal challenging the district court sanctioning judge for bias and prejudice for having interfered with the appellate review of the sanctioned attorney's 1995 misdemeanor conviction when Judge O'Scannlain was on that 1995 panel and would be a witness to events there?

V. CONCLUSION

Petitioners are aware of the conventional wisdom that Petitions should emphasize no more than one or two main points. However, it is submitted that the immensity and the enormity of the truly vast number of unique statutory rule and due process violations committed below cannot be fully appreciated without a complete understanding of the breadth and depth of the full spectrum of those abuses inflicted on these Petitioners, sufficient, it is sincerely hoped, to warrant and merit your urgent review next Term.



Honolulu, Hawaii
May 8, 2002

GARY VICTOR DUBIN
Attorney for Petitioners

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APPENDIX

1. Fifth Amendment To The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 144 Of Title 28 Of The United States Code

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . . .

3. Section 455 Of Title 28 Of The United States Code

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding ; . . .

4. Canon 3(A) Of The Code Of Conduct For United States Judges Promulgated By The Judicial Conference

A. (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. . . .

5. Canon 3(C) Of The Code Of Conduct For United States Judges Promulgated By The Judicial Conference

C. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such person: . . .

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding. . . .

6. Rule 11 Of The Federal Rules Of Civil Procedure

Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by or for the attorney of record in the signing attorney's own individual name, See Rule 81(d)(2), or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Any stipulation for a money judgment shall be signed by an authorized

representative of the Attorney General. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause

before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

7. Rule 53 Of The Federal Rules Of Civil Procedure

(a) Appointment and compensation.

The court in which any action is pending may appoint a special master therein, subject to the approval of the chief judge. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference.

A reference to a master shall be the exception and not the rule. Save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers.

The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties

and master, may apply to the court for an order requiring the master to speed the proceedings and to make the master's report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk and serve on all parties notice of the filing unless otherwise directed by the order of reference, and shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of

reference, the master shall serve a copy of the report on each party.

(2) Acceptance of Report. The court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) Draft Report. Before filing the report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Application of Magistrate Judge.

A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

8. Debtor's Motion To Withdraw The Reference In Its Entirety, Civil No. 98-00463, filed June 3, 1998

NOTICE OF MOTION

TO ALL PARTIES REQUESTING NOTICE IN THIS CASE SHOWN ON THE ATTACHED SERVICE LIST:

PLEASE TAKE NOTICE that the above-identified motion to withdraw the reference in its entirety in the above-referenced Bankruptcy Case will come on for hearing before the Honorable, DAVID A Ezra, United States District Judge, on Aug 10, 1998, at the hour of 11:15 a.m. o'clock, in his/her courtroom at the Federal Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawaii 96813, or as soon thereafter as counsel may be heard.

You are invited to attend and to file papers in support of or in opposition hereto, or taking no position herein, in accordance with the Rules of Court.

DATED: Honolulu, Hawaii; June 3, 1998.

DEBTOR'S MOTION TO WITHDRAW THE REFERENCE IN ITS ENTIRETY

COMES NOW the Debtor ALLAN RYO KUNIMOTO, by and through his U.S. District Court counsel, Gary Victor Dubin and Gregg Young, and hereby moves this Honorable Court, pursuant to Section 157(d) of Title 28 of the United States Code and LBR 5011-1, for an Order withdrawing the reference in his Bankruptcy Case in its entirety, as a mandatory withdrawal, this Case now involving consideration of the applicability and interpretation and enforcement of non-Title-I I matters affecting interstate commerce, having to do with federal racketeering and consumer credit statutes, the right to trial by jury, as well as the enforcement of private rights pursuant to due process constitutional guaranties contained within the Fifth and Fourteenth Amendments to the United States Constitution.

This Motion is based upon the accompanying Declaration of Counsel, the attached Memorandum In Support of Motion, its Exhibit "A", and the papers and files in this Case.

The Court is requested to direct the Clerk of the Bankruptcy Court to transmit the records and files in the underlying Bankruptcy Case to this United States District

Court for review in conjunction with the consideration of this Motion.

DATED: Honolulu, Hawaii; June 3, 1998.

MEMORANDUM IN SUPPORT OF MOTION

Section 157(d) of Title 28 requires a three-prong test for mandatory withdrawal: that a District Court "shall" (1) upon a party's (2) timely motion, withdraw a proceeding from its Bankruptcy Court (3) "if the court determines that resolution of the proceeding requires consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce".[1]

It is now clear from the Debtor's filing of his Complaint in this Court today, as set forth within Exhibit "A" hereto, that he meets all three requirements: he is a party, the principal party to his own Bankruptcy Case, his Bankruptcy Case will depend upon a resolution of that civil action first, which clearly relates to non-Title-11 issues which affect interstate commerce, specifically the interstate consumer and banking laws, as do the Debtor's principal adversaries, as shown in the attached Complaint, and his request to withdraw the reference is surely timely, in fact made the very day his civil complaint was prepared and filed in this Court.

Mandatory withdraw is especially warranted here where, for instance, Section 1673 of Title 15 is implicated, since a federal agency, the U.S. Department of Labor, is its exclusive enforcement agency for that public right.[2]

1 For the standard three-part test, see, e.g., In Re Baldwin-United Corp., 57 B.R. 751 (S.D. Ohio 1985).
2 See, e.g., In Re Fresh Approach, Inc., 51 B.R. 412 (N.D. Tex. 1985)

Moreover, withdrawal is usually considered mandatory when a party has a right to trial by jury.[3]

This being so, the Debtor now desires to improve the administration of his estate in the interests of justice by allowing this Court, now hearing his civil action, to have before it all of the related issues that will necessarily arise in his Bankruptcy Case.

DATED: Honolulu, Hawaii; June 3, 1998.

3. See, e.g., In Re Novak, 116 B.R. 626 (E.D. Ill. 1990)

DECLARATION OF COUNSEL

I, GARY VICTOR DUBIN, DECLARE:

1. I am admitted to practice law in this United States District Court, and with attorney Gregg Young I represent the Debtor in these proceedings in this Court.

2. Attached hereto as "Exhibit 'A" is a true and correct copy of the Debtor's Complaint brought in this Court, known as Civil No. 98-00453 HG, which summarizes the Debtor's position with regard to the non-Title 11 issues now central to his Case.

3. This Motion is brought in the interests of justice, in conformity with federal law, and not for purposes of delay. declare under penalty of perjury that the foregoing is true and correct. Executed at Honolulu, Hawaii, on June 3, 1998.

/s/ GARY VICTOR DUBIN

Exhibit "A"

COMPLAINT FOR (1) WRONGFUL EXECUTION, (2) RACKETEERING VIOLATIONS, (3) BREACH OF FIDUCIARY DUTY, (4) CONVERSION, (5) CONTRIBUTION, (6) IMPOSITION OF CONSTRUCTIVE

TRUSTS, (7) WILLFUL BREACH OF CONTRACT TO PROVIDE ESTATE PLANNING SERVICES, (8) INTENTIONAL AND GROSSLY NEGLIGENT INFLICTION OF EMOTIONAL HARM; (9) CIVIL CONSPIRACY TO INTERFERE WITH DUE PROCESS OF LAW AND CONSTITUTIONAL FAIR TRIAL RIGHTS, AND (10) PUNITIVE DAMAGES- DEMAND FOR TRIAL BY JURY IN THE UNITED STATES DISTRICT COURT; SUMMONS AND NOTICE OF STATUS CONFERENCE IN AN ADVERSARY PROCEEDING

COMES NOW Plaintiff ALLAN RYO KUNIMOTO (hereinafter "KUNIMOTO"), by and through his attorneys, Gary Victor Dubin and Gregg Young, and hereby, for causes of action against Defendants JAY M. FIDELL (hereinafter "FIDELL"), BANK OF HAWAII (hereinafter "BOH"), CARLSMITH BALL WICHMAN CASE & ICHIKI (hereinafter "CARLSMITH"), JAMES R. STARSHAK (hereinafter STARSHAK JOHN CANDON (hereinafter "CANDON"), and DOES I THROUGH 100 (hereinafter "DOE DEFENDANTS"), alleges and avers as follows:

The Parties

1. KUNIMOTO, at all times material hereto, was and is a resident of the City and County of Honolulu in the State of Hawaii, and a licensed practicing physician therein, and a Defendant and sometimes Counterclaimant in various civil cases, identified infra, brought by BOH involving him, corporations of his, and his family members (wife and three college-age children), and the Debtor in Case No. 97-03185, a Chapter 11 proceeding in this District commenced on September 26, 1997.

2. FIDELL, at all times material hereto, was and is a resident of the City and County of Honolulu in the State of Hawaii, and a licensed practicing attorney therein, and the Court-Appointed Receiver in execution of various Hawaii State Court deficiency Judgments, identified infra, against KUNIMOTO and corporations of his, in favor of BOH, in the First Circuit Court of the State of Hawaii, from on or about

December 21,1995, through on or about November 25, 1997.

3. CARLSMITH, at all times material hereto, was and is an association of licensed practicing attorneys in the State of Hawaii and doing business in the City and County of Honolulu, and, upon information and belief, has provided legal representation to BOH and to its officers personally for decades, to this day, and since in or about 1989, through in or about 1995, have also at one and the same time continuously provided legal representation to KUNIMOTO personally, to his wife, and to various of his business entities.

4. STARSHAK, at all times material hereto, was and is a resident of the City and County of Honolulu in the State of Hawaii, and a licensed practicing attorney therein, upon information and belief a partner in the former law firm of Conahan and Cohanan in or about early 1981 when he began to provide estate planning advice to KUNIMOTO and to his wife, who sometime in or about 1989 joined the CARLSMITH law firm, then and there continuing to provide estate planning advice to KUNIMOTO and to his wife through in or about 1995, while introducing KUNIMOTO to other attorneys in CARLSMITH who KUNIMOTO subsequently retained for other legal services.

5. CANDON, at alt times material hereto, was and is a resident of the City and County of Honolulu of the State of Hawaii, and a licensed practicing certified public accountant therein, and the Court-Appointed Trustee of the Kunimoto Bankruptcy Case, identified supra, appointed shortly after the filing of KUNIMOTO's bankruptcy petition in late 1997, to this day.

6. DOE DEFENDANTS I through 100, identified presently by their fictitious names, are believed to be others who have aided and abetted the above-named Defendants, and conspired with one or more of them, to inflict upon KUNIMOTO the injuries, harm, and damage complained of below, either intentionally or recklessly, as officers, directors, employees, attorneys, accountants, joint venturers, representatives, agents, co-conspirators, government officials, or in some other capacity liable to

KUNIMOTO, whose names and/or degree of culpable participation with said named Defendants in the events and/or transactions described below is not yet sufficiently identified or known to KUNIMOTO or to his attorneys so as to justify or require or permit, pursuant to Rule 11 responsibilities, that they be named as Defendants herein at this time, but leave of Court will be requested to name such additional party defendants when their identity and/or culpability does become sufficiently identified and/or known, including with respect to suspected civil rights violations of Section 1343, Section 1981, and Section 1985 of Title 42 of the United States Code, and with respect to the absence of any applicable doctrines of absolute judicial and/or official immunity.

Jurisdiction and Venue

7. This is a Bankruptcy Code core proceeding, involving inseparably mixed prepetition and post-petition claims based upon private rights protected by both United States Statutes and the Constitution of the United States of America, many of which are triable by jury as of right, which directly are related to and materially affect the affairs and the financial health of KUNIMOTO as Debtor — especially if BOH judgments are not discharged therein — and his Creditors in his Chapter 11 Bankruptcy Case, supra

8. This action is brought, and the jurisdiction herein founded, inter alia:

(a)pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment guaranteeing private enforcement rights to a fair trial by a neutral and impartial state tribunal,

(b)pursuant to Sections 1961 et seq. of Title 18 of the United States Code under the Racketeering Influenced and Corrupt Organizations Act ("RICO"),

(c)pursuant to Section 1673 of Title 15 of the United States Code under the Consumer Protection Credit Act ("CPC"), and

(d)pursuant to various other and related and/or combined federal statutes, including Section 215 (corrupt bankers), Section 1341 (mail fraud), Section 1343 (wire fraud), Section 1344 (bank fraud), Section 1952 (racketeering enterprises), Section 1961A (state law bribery), Section 1961D (bankruptcy fraud), Section 1962 (racketeering investments), and Section 1964 (civil racketeering remedies) of Title 18 of the United States Code.

9. Jurisdiction is conferred upon this United States District Court pursuant to Section 1331 and Section 1334(b) of Title 28 of the United States Code, and as to all pendent, ancillary, and/or related claims described herein.

10. Venue is proper in this District pursuant to Section 1965(a) of Title 18 of the United States Code and Section 1391(b) of Title 28 of the United States Code.

Background Facts

11. KUNIMOTO began his Honolulu medical career in late 1971, immediately became a well-known, successful Hawaii physician and President of many local medical boards and societies.

12. Until a few years ago, KUNIMOTO, as a result of wise investments, mainly in real estate, had a net worth of approximately $70,000,000, and now is in Bankruptcy with an apparent net worth, except for his claims herein, amounting to less than zero.

13. His troubles began in early 1984 when he was solicited by BOH as a
customer with promises of a long-term, favored banking relationship — which enticed eventually into borrowing approximately $25,000,000 from BOH to assist him in the phase and financing of numerous real estate investment projects, including a multi-million-dollar multi-Island plant and nursery business.

14. BOH at that time was not KUNIMOTO's only lender. First Hawaiian and several other local lending institutions also had welcomed his business and were participating in his investment projects.

15. When, however, KUNIMOTO began during 1990 to experience cash flow problems — despite his then enormous net worth — BOH reneged on its various financing promises, jeopardizing his investments and causing havoc with his other banking relationships.

16. BOH, whether due to a lack originally of adequate mid-level loan-officer supervision, or at the other extreme motivated recklessly by sheer greed on the part of its executive officers, forced KUNIMOTO into a so-called loan workout" program —during which BOH charged Dr. Kunimoto admitted excessive and punitive default interest rates, often in secrecy, took over the management of his investment projects, which its executives placed in the hands of incompetent political cronies and insider real estate sales personnel, and one "novice" real estate agent who turned out to be the admitted sister-in-law of BOH's Chief Executive Officer, and through a series of irresponsible management blunders caused KUNIMOTO, through a domino effect, to lose all of his investment assets.

17. Notwithstanding interference by BOH, and its self-dealing with his assets on the part of its executives, partially as a result of the powerful, ever-tightening stranglehold that BOH had on his financial affairs, KUNIMOTO nevertheless cooperated with its officials during their imposed loan workout program, liquidating his assets through forced sales, and paid BOH back almost all but a few million of its $25,000,000 that over time he had borrowed from it, much of the remaining amounts representing unearned high-rate default interest.

18. BOH, however, was still not satisfied, and proceeded in 1993 to file several state foreclosure actions, e.g., Civil No. 93-1636, ironically on mortgages that KUNIMOTO had given it during the "loan workout period as additional collateral, which were never supposed to have become the subject of independent foreclosure actions, and BOH secured several million dollars in deficiency judgments following public auctions of some of his properties at below market value, including on those Notes in the process, permitting them to further squeeze KUNIMOTO's few remaining assets.

19. In 1994, BOH then sued KUNIMOTO and one of his corporations on mostly remaining unsecured notes — which cases led to five State Court consolidated cases (hereinafter "CONSOLIDATED CASES") recently tried before the Honorable B. Eden Weil in First Circuit Court, known as Civil Nos. 94-2371, 94-2138, 94-2139, 94-3598, and 95-0660. In those cases, in late 1994, KUNIMOTO, for the first time, never an aggressive litigant in any court before, countersued BOH for the damages that it had inflicted on him and which eventually caused his complete bankruptcy.

20. One of the CONSOLIDATED .CASES, ironically, Civil No. 95-0660, sought to set aside recent, so-called fraudulent conveyances of property by KUNIMOTO, which transfers were actually made necessary to correct estate planning errors made by CARLSMITH — the law firm which was also representing BOH now against KUNIMOTO — in its estate planning representation of KUNIMOTO aforesaid.

21. Beginning in approximately early 1981, STARSHAK, who joined CARLSMITH a few years later while advising KUNIMOTO, was requested by KUNIMOTO to prepare an estate plan that would protect his medical practice and estate for his wife and children.

22. The wills and trusts that he created, and the conveyance instruments he drew and recorded, however, were negligently drawn and defective, prepared contrary to the specific requests of KUNIMOTO and below the level of care and lawyering practiced in the estate planning field in Honolulu.

23. Said legal advice continued to be rendered to KUNIMOTO by STARSHAK and CARLSMITH up to and including 1995, as evidenced by CARLSMITH'S billings to KUNIMOTO — several years after CARLSMITH began to represent BOH in litigation against KUNIMOTO — and while CARLSMITH, on behalf of BOH, was seeking to set aside conveyances left unprotected from KUNIMOTO creditors, including BOH, precisely due to the poor earlier estate planning work of STARSHAK and CARLSMITH and their further unsuccessful 1992 efforts, due to still more faulty

draftsmanship in 1992, to repair their earlier estate planning mistakes.

24. Nevertheless, in the CONSOLIDATED CASES, CARLSMITH on behalf of BOH prosecuted fraudulent conveyance claims in First Circuit Court against KUNIMOTO and his family members, knowing full well that had it not been for their legal malpractice there would have been no legal basis whatsoever in 1997 for such claims by BOH as to such estate planning transfers which were supposed to have been completed almost a decade earlier but for the negligence of STARSHAK and CARLSMITH aforesaid.

The Enterprise

25. BOH is the dominant financial institution in Hawaii, the behind-the-Scenes hidden Government of the Islands, and for decades its executives have been used to having their way, exercising through their financial muscle — in the form of mortgages and other financial favors bestowed upon those it sponsors — extensive political power in this State through an "old boy" network of BOH and CARLSMITH employees and their family and political friends who continue to permeate every institution and aspect of governance in this State.

26. BOH's influence within the State Judiciary has been especially dominant its executives and now CARLSMITH partners, for instance, have taken turns maintaining powerful positions on the State Judicial Selection Commission for years, including its Chairship, on the State Senate Judiciary Committee, including its Chairship, in the State Attorney General's Office, including the present Attorney General, and in the State Legislature where several CARLSMITH partners dominate.

27. BOH's influential tentacles are everywhere there is any semblance of political power in this State, and KUNIMOTO'S experience is a textbook example of the arrogance that accompanies such unchecked financially-generated political power in a relatively small State.

Predicate Acts of Bank Fraud

28. When in 1990 KUNIMOTO began to experience cash flow difficulties, as aforesaid, the executive officers of BOH stepped in to control his valuable properties and self-dealt with them, attempting through management contracts and exclusive DROA listings, including with the sister-in-law of the Bank's Chief Executive Officer, to generate huge and unearned personal profits for their relatives as family gifts, and for their political "old boy" friends as a quid pro quo for their directing lucrative business to BOH in the form of payroll and pension accounts — in complete and callous disregard of the actual value of KUNIMOTO's real properties and nursery businesses which in the process were gutted in the hands of BOH cronies.

29. Such self-dealing, its profits reinvested in personal accounts, violated numerous federal criminal laws, including Section 215 (corrupt bankers), Section 1341 (multiple mail fraud), Section 1343 (multiple wire fraud), Section 1344 (bank fraud), Section 1952 (racketeering enterprises), and Section 1962 (racketeering investments) of Title 18 of the United States Code.

Predicate Acts of Bribery

30. Once KUNIMOTO filed his Counterclaim in the CONSOLIDATED CASES in late 1994, BOH recognized its extensive liabilities, and in late 1992 set out to destroy KUNIMOTO by placing a stranglehold on KUNIMOTO's finances so that he could not fund the prosecution of his claims and defenses against BOH.

31. By early 1995 BOH, represented by CARLSMITH, had perfected multi-million-dollar deficiency judgments aggregating nearly $1,700,000 against KUNIMOTO in 1993 foreclosure litigation, aforesaid, as a part of his alleged defaulted loans, due to an archaic and unconstitutional foreclosure deficiency judgment policy maintained in. Hawaii that allows lenders a double recovery by disregarding the foreclosure blight" on property sold at public auction for a sales price always below market value, and that reduces the number of potential purchasers due to

auction requirements so as to guarantee a below market auction price.

32. In execution upon those judgments, BOH, represented by CARLSMITH, secured from the First Circuit Court the unprecedented appointment of FIDELL as a receiver for KUNIMOTO's medical practice — and FIDELL, at BOH's urging, took custody and control over all of KUNIMOTO's gross receipts, distributing to BOH and to KUNIMOTO commencing in late 1995 a greater and a lesser percentage, respectfully, of his earnings than constitutionally mandated by federal and state consumer protection laws, backed up by state court orders that were and are on their face void as a matter of federal law. As a consequence, KUNIMOTO was unable to pay his Mainland attorneys who consequently in 1996 withdrew their representation in the CONSOLIDATED CASES.

33. Undaunted, however, KUNIMOTO continued his trial preparation in the CONSOLIDATED CASES with unpaid local counsel, to the consternation of BOH, who then set out to deny KUNIMOTO even any funds whatsoever for personal living expenses.

34. Executing at the instructions of BOH, FIDELL, beginning in early 1997, six months before trial of the CONSOLIDATED CASES, feigning that KUNIMOTO was being uncooperative with him in processing office accounts, which FIDELL knew was a false accusation, completely cut off all funds to KUNIMOTO and his family — in total violation of federal and state garnishment laws — only that summer paying a few of KUNIMOTO'S medical office bills, causing KUNIMOTO and his pro bono counsel to have no funds for indispensable real estate and damage assessment experts for trial (which resulted in their exclusion) and barely enough to fly their Mainland lender liability expert to Honolulu without any possible advance preparation.

35. Neither BOH or FIDELL had any such financial problems. BOH, which upon information and belief has spent at least $7,000,000 with CARLSMITH and a San Francisco law firm preparing and defending at trial in the CONSOLIDATED CASES, allowed FIDELL and his law firm to claim and to take exorbitant and excessive fees and costs

— $263,082.37 — from December 25, 1995, to November 25, 1997, what amounted to a deliberate bribe of a court-appointed receiver and quid pro quo payoff for his financial stranglehold on KUNIMOTO's professional income, allowed with BOH's influential sponsorship in the state court to pocket well over 20% of KUNIMOTO'S entire gross receipts during that two-year period for doing virtually nothing, more than KUNIMOTO'S entire net earnings, while not even paying since early 1997 KUNIMOTO'S operating costs, nor any of KUNIMOTO'S personal expenses, and not even during that entire period of time KUNIMOTO's Hawaii General Excise Tax or State or Federal Income Taxes — which now plague KUNIMOTO'S Bankruptcy estate.

36. As a result, KUNIMOTO and his family were left penniless and destitute, living off the gifts and loans of relatives and friends, while KUNIMOTO continued to service his patients without any pay himself now for more than one year.

37. KUNIMOTO, however, refused to settle with BOH on its draconian we'll-take-everything take-it-or-leave-it terms, and continued with his unfunded pro bono counsel to prepare for trial in the CONSOLIDATED CASES despite the lack of most of their needed experts.

38. BOH's case at trial was so weak that its executives still were apparently unwilling to risk losing, despite the comparative imbalance in litigation funds, so only weeks before trial they arranged for a sweetheart mortgage payoff to their presiding state court trial judge, who, although matter-of-factly — now believed staged — informed the parties before trial that she indeed had a residential mortgage with the Bank of Hawaii supposedly on regular market rates, later KUNIMOTO's counsel discovered that the terms were below market at the time, and still later that her BOH loan officer, a material witness in the CONSOLIDATED CASES, had been KUNIMOTO's loan officer as well — which she also failed to disclose.

39. When these blatant facts of disqualification were presented to their presiding judge in the CONSOLIDATED CASES, contrary to state law, she refused to address or to even deny same, but ignored most of the disqualifying facts

altogether, ruling only that some were "untimely" — and then proceeded to gut KUNIMOTO's entire case —telling the jury that KUNIMOTO was liable to BOH and the only remaining question was only how much, and refusing to allow all but $15,000 of KUNIMOTO'S $70,000,000 Counterclaim to be considered by the jury, after refusing to allow most of KUNIMOTO'S witnesses to testify and refusing to admit into evidence most of KUNIMOTO's trial exhibits, or even to allow KUNIMOTO's one expert — who traveled to Honolulu from California — virtually to even testify before the jury.

40. Such outright official bribery violated numerous federal and state criminal laws, including Section 1961A (state law bribery) of Title 18 of the United States Code.

Predicate Acts of Bankruptcy Fraud

41. The CONSOLIDATED CASES, not surprisingly, given the comparative imbalance in litigation funds and the one-sided rulings of a bought judge, although a suspicious jury nevertheless rejected the principal and interest figures presented to them by BOH, reducing the requested award by nearly one million dollars, resulted in two judgments against KUNIMOTO and his wife on January 9, 1998: (1) $2,972,682.23 against KUNIMOTO and $5,157,666.00 against KUNIMOTO and his wife, and (2) the setting aside of several earlier between-family-member transfers.

42. During trial of the CONSOLIDATED CASES, KUNIMOTO was finally forced into Bankruptcy to rid himself of FIDELL as Receiver for his medical practice, so as to secure sufficient funds with which to appeal the two adverse judgments.

43. CANDON, however, was appointed Trustee late last year in his Bankruptcy case, took the monies of his that FIDELL had been holding, continued BOH's sponsored policy of refusing to pay virtually any of KUNIMOTO'S personal and family expenses, nor even all of his medical office overhead, has now reportedly made a secret deal with BOH, which includes abandoning KUNIMOTO'S appeals altogether, and CANDON'S attorney even appeared before

KUNIMOTO's trial judge hearing KUNIMOTO'S motion to set aside the two judgments against him, CANDON's attorney telling the trial judge that the Trustee believes that $8,000,000 in adverse judgments are "beneficial" to the Bankruptcy estate, that they should not be set aside by her, and CANDON, having tried to let the state appellate clock run on the appeals, which would have happened but for the timely action of KUNIMOTO'S attorneys who filed notices of appeal on his behalf anyway, now is seeking in Bankruptcy Court to do BOH's bidding by trying to stop KUNIMOTO from filing an Opening Brief to sustain his appeals.

44. CANDON's clear malfeasance in office is part and parcel of a pattern of official subversion artfully engaged in throughout the history of the BOH/KUNIMOTO litigation by CARLSMITH, BOH attorney's, who at every turn have sought to deprive KUNIMOTO of any real day in court.

45. CANDON's flagrant prejudicial conduct, benefiting no one other than BOH, replete with misrepresentations to the Bankruptcy Court, amounts to nothing less in these circumstances than an outright egregious violation of Section 1961 D (bankruptcy fraud) of Title 18 of the United States Code.

The Principals

46. KUNIMOTO will prove and therefore hereby alleges that the conduct of FIDELL. BOH, CARLSMITH, and CANDON, which individually constitutes separate causes of action, when taken together constitute an overwhelming pattern of continuous racketeering activity proscribed pursuant to Section 1962 of Title 18 of the United States Code.

47. KUNIMOTO further alleges that FIDELL, BOH, CARLSMITH, and CANDON, each and all, who have aided, abetted, counseled, commanded, and/or induced and/or procured each other in the commission of the above-referenced offenses are jointly and severally liable to KUNIMOTO — liable as principals pursuant to Section 2 of Title 18 of the United States Code.

48. KUNIMOTO also alleges that the monies taken wrongfully and illegally from him as aforesaid have found their way into the personal coffers and organizational bank accounts of FIDELL, BOH, CARLSMITH, and CANDON — and their respective legal and accounting firms and financial institutional accounts — and same should similarly be surcharged and made liable to repay to KUNIMOTO what has been taken from him and what will compensate him for his tosses and damages.

Measure of Damages

49. As a result of the wrongs complained of above, KUNIMOTO has suffered financial losses, and will continue to suffer financial losses, in an amount in excess of $70,000,000 — the exact amount to be determined according to proof at trial.

50. Pursuant to Section 1964(c) of Title 18 of the United States Code, KUNIMOTO is entitled to three times his actual damages — treble the exact amount to be determined according to proof at trial.

51. Pursuant to applicable law, KUNIMOTO is entitled to a multiple of at least five times his actual damages — at least five times the exact amount to be determined according to proof at trial, for the intentional, wanton, malicious, and/or reckless acts complained of herein, done with complete indifference and disregard for KUNIMOTO's health and feelings and finances and medical practice and patients, as exemplary and punitive damages.

52. KUNIMOTO is also entitled to his full costs of suit and to his reasonable attorneys' fees and expenses.

53. KUNIMOTO is also entitled to an award of prejudgment and post judgment interest on all amounts wrongfully collected and/or withheld from him.

COUNT ONE
Wrongful Execution Against Fidell BOH and Carlsmith

54. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

55. Said deficiency judgments upon which said Receivership was based, procured by BOH and by CARLSMITH, were unconstitutional, the result of deprivations of federal economic due process of law failing to account for the true market value of the underlying real properties, thus injuring KUNIMOTO financially, and constituting wrongful execution, denying to KUNIMOTO funds for his CONSOLIDATED CASES.

56. Said deficiency judgments were mistakenly recorded by BOH and by CARLSMITH in the State Bureau of Conveyances nearly one year before they were final and effective, as liens upon KUNIMOTO and his properties, thus injuring KUNIMOTO financially, and constituting wrongful execution.

57. Said Receivership, moreover, represented an unconstitutional delegation of enforcement powers in violation of Section 1673 of Title 15 of the United States Code, contrary to the Supremacy Clause of the United States Constitution and all such Receivership orders entered by the First Circuit Court, procured by CARLSMITH and by BOH were void ab initio, entitling KUNIMOTO to the return of all monies wrongfully taken by FIDELL pursuant to void State Court orders, thus injuring KUNIMOTO financially, and constituting wrongful execution.

58. The Receivership orders having been procured by BOH and by CARLSMITH without lawful authority, BOH and FIDELL are jointly and severally liable for said funds each received and CARLSMITH for whatever percentage or amount thereof it received as compensation for procuring same and all accordingly for the return of all aggregate amounts to KUNIMOTO, with interest thereon, forthwith.

COUNT TWO
Racketeering Violations Against Fidell, BOH, Carlsmith, and Candon

59. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

60. In violation of Section 1962(b) of Title 18 of the United States Code, FIDELL, BOH, CARLSMITH, and

CANDON are all "persons" within the meaning of RICO who have acquired and maintained control, directly or indirectly, of their respective organizations and/or entities — all "enterprises" engaged in and/or affecting interstate commerce, with clients engaged in and/or affecting interstate commerce — using interstate mailings and wires and telephones in the conduct of said enterprises, and wrongfully diverting into said enterprises by the use of said interstate means KUNIMOTO assets aforesaid for their own selfish and unlawful gain, as co-conspirators whose flagrant and abusive "pattern of racketeering activity" has resulted in their maintaining and enriching corrupt enterprises engaged in and/or affecting interstate commerce such that Section 1964 treble damages and other relief are appropriate.

61. In violation of Section 1962(a) of Title 18 of the United States Code, FIDELL, BOH, CARLSMITH, and CANDON have also used or invested, directly or indirectly, part of all of such ill-gotten gain, or the proceeds from such income, in the operation and maintenance of their respective organizations and/or entities engaged in and/or affecting interstate commerce as aforesaid, such that Section 1964 treble damages and other relief are applicable.

62. In violation of Chapter 842 of the Hawaii Revised Statutes, FIDELL, BOH, CARLSMITH, and CANDON have received income, directly or indirectly, from racketeering activity as aforesaid, and have used such ill-gotten gains to maintain, directly or indirectly, control and/or an interest in their respective organizations and/or entities as aforesaid, to be entitled to recover damages pursuant to Section 842-8 thereof as an independent state law remedy.

COUNT THREE
Breach of Fiduciary Duty Against Fidell and Candon

63. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

64. Both FIDELL and CANDON, by virtue of their Court appointments, have maintained a fiduciary relationship both with KUNIMOTO and with his estate, which

has been materially breached by the conduct of each complained of herein, such that KUNIMOTO is entitled to recover from each funds wrongfully taken and/or withheld by each or pursuant to the direction of each and/or wrongfully paid to others by each, with interest thereon, and to have each discharged for cause and surcharged for such damages and/or losses, including interest thereon.

COUNT FOUR
Conversion Against Fidell and BOH

65. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

66. By receiving monies belonging to KUNIMOTO pursuant to void State Court Receivership orders as aforesaid, Fidell and BOH have improperly retained same, both post- and pre-petition, especially in lieu of KUNIMOTO'S Bankruptcy filing making same in part recoverable preferential payments, returnable to him for his benefit and/or to his estate for the benefit of his creditors, with interest thereon, and a fuller and more complete accounting than heretofore, as this Court may subsequently order and direct.

COUNT FIVE
Contribution Against Carlsmith and Starshak

67. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

68. The aforesaid money judgment in the amount of $5,157,666.00 was entered jointly and severally on January 9, 1998, by the Honorable Judge B. Eden Weil of the First Circuit Court of the State of Hawaii in Civil No. 95-0660, against KUNIMOTO and his wife, in favor of BOH, as a result, in part, of alleged fraudulent real property conveyances between KUNIMOTO family members — the result of attempts by them in part to correct earlier legal malpractice estate planning mistakes committed by STARSHAK and CARLSMITH, as explained aforesaid.

69. Consequently, since KUNIMOTO relied upon the professional judgment of STARSHAK and CARLSMITH and had no reason to doubt their competence at the time, in the event that the KUNIMOTO appeals are unsuccessful or are prevented from being prosecuted by the Bankruptcy Court, KUNIMOTO and his wife (and/or the KUNIMOTO estate as this Court may subsequently order and direct) should be indemnified by STARSHAK and by CARLSMITH, jointly and severally, such that if KUNIMOTO and his wife and/or his estate owe anything by said judgment as a result of the legal malpractice of STARSHAK and/or CARLSMITH, they should indemnify KUNIMOTO accordingly and/or receive equitable contribution and/or reimbursement from STARSHAK and from CARLSMITH in like amount as to whatever they or the Kunimoto estate is liable to pay.

70. The wrongful conduct of STARSHAK and CARLSMITH has caused said judgment, in part, to have been entered and KUNIMOTO and his wife and/or his estate to become embroiled in said controversy and having to have had to defend same. As provided for in Uyemura v. Wick, 57 Haw. 102, 551 P.2d 171 (1976), KUNIMOTO is entitled therefore to recover from STARSHAK and from CARLSMITH, his former estate planning attorneys, all damages suffered on account of such litigation, including attorneys' fees and all costs.

71. Said judgment in favor of BOH should therefore be matched by a corresponding judgment in whole or iii part entered by this Court against STARSHAK and CARLSMITH, who should henceforth be the principal obligors to BOH for like amount.

72. Said contribution claim arose subsequent to the filing of KUNIMOTO'S Bankruptcy petition, following said adverse judgment being entered, but to the extent that said underlying obligation to BOH is chargeable to the KUNIMOTO estate and is discharged in Bankruptcy, KUNIMOTO asserts same here on behalf of his estate; otherwise, KUNIMOTO asserts same on his own behalf.

COUNT SIX

Imposition of Constructive Trusts Against Fidell and BOH

73. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

74. It would amount to unjust enrichment to allow FIDELL and/or BOH to retain amounts unlawfully collected and taken from KUNIMOTO, both pre-petition and post-petition, pursuant to void State Court orders in violation of CPC, or that constitute preferential payments under the Bankruptcy Code.

75. KUNIMOTO is therefore entitled, with his estate, in whatever proportion as this Court may subsequently order and direct, to have FIDELL and BOH be declared involuntary constructive trustees of all such monies wrongfully taken and withheld pursuant to CPC and/or the Bankruptcy Code, and as to alt profits from enterprises in which said funds were invested by each of them in the interim, with interest thereon, including as involuntary constructive trustees of alt such enterprises purchased or substantially enhanced by said funds traceable to said involuntary investment by KUNIMOTO, without subtraction for any losses incurred thereby.

COUNT SEVEN
Willful Breach of Contract To Provide Estate Planning Services Against Starshak and Carlsmith

76. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

77. The handling of KUNIMOTO's estate planning by STARSHAK and CARLSMITH as aforesaid was incompetent in that it felt below the standard of care and competency of the legal profession in that field in the City and County of Honolulu at the time that said services were performed or were attempted to be performed.

78. Said misconduct was, in part, willful, done in a deliberate desire to injure KUNIMOTO in favor of benefiting BOH and their competing client's interest, such that KUNIMOTO is entitled to recover punitive damages, as aforesaid, for intentional breach of contract.

COUNT EIGHT
Intentional and Grossly Negligent Infliction of Emotional Harm Against Fidell, BOH, Carlsmith, Starshak and Candon

79. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

80. FIDELL BOH, CARLSMITH STARSHAK, and CANDON, in carrying out the acts complained of above, individually and collectively, ignored the financial, physical, and mental health of KUNIMOTO and acted maliciously, without justification, and not for the purpose of furthering any legitimate interests of theirs, but with the intent to harm KUNIMOTO, to profit by his demise, and to force and to coerce him to surrender valid claims and defenses against BOH and in order to deprive him of a fair trial before a neutral and impartial tribunal in the CONSOLIDATED CASES, to reduce BOH's risk of adverse jury awards,

81. As a result of same, and knowing that they each and all were inflicting upon KUNIMOTO serious emotional distress and physical injury, including headaches and depression and worry over his inability to provide for the necessary needs and living expenses of his wife and family as a result of their wrongful acts, they nevertheless continued to inflict severe and extensive emotional injury upon him, with physical and psychological effects, all to the detriment of KUNIMOTO and his family relationships, can causing KUNIMOTO to have sustained and continue to sustain extensive damages for which each of said Defendants are liable.

COUNT NINE
Civil Conspiracy To Interfere with Due Process of Law and Constitutional Fair Trial Rights Against Fidell and BOH

82. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

83. FIDELL and BOH have conspired and acted together to cut off all funds to KUNIMOTO prior to trial to

injure his ability to defend himself and to prosecute his Counterclaim in the CONSOLIDATED CASES, by procuring the appointment of FIDELL as Receiver, and by defrauding the First Circuit Court, or worse, into concluding that KUNIMOTO was not cooperating with the Receiver sufficient to secure the total cut-off of all funds to him for nearly one year prior to trial.

84. KUNIMOTO moreover, conspired with third parties, not yet fully identified, to influence, as aforesaid, the presiding judge in the CONSOLIDATED CASES to control the outcome of the cases behind the jurors backs by restricting KUNIMOTO trial evidence and claims and defenses, which resulted in a grossly unfair trial titled sharply in BOH's favor from the outset.

85. As a consequence, KUNIMOTO was deprived of his State Court constitutional right to trial by jury and his concomitant federal and state court rights to a fair and trial before an impartial tribunal.

COUNT TEN
Punitive Damages Against Fidell, BOH, Carlsmith, KUNIMOTO and Candon

86. KUNIMOTO realleges and incorporates herein by this reference each and every allegation above.

87. As a result of the grossly willful, wanton, intentional and/or reckless criminal behavior of the Defendants complained of above, KUNIMOTO prays entitlement to a separate and distinct award of exemplary and punitive damages as aforesaid with respect to Counts One, Two, Three, Four, Seven, Eight, and Nine of this Complaint.

Prayer for Relief

WHEREFORE, Plaintiff KUNIMOTO prays that he have judgment against all Defendants, jointly and severally, in accordance with his aforesaid Counts, as follows:

1. COUNT ONE (Wrongful Execution): $70,000,000 or more in actual damages, plus punitive damages and court costs and attorneys' fees.

2. COUNT TWO (Racketeering Violations): $70,000,000 or more in actual damages, trebled, plus punitive damages and court costs and attorneys' fees.

3. COUNT THREE (Breach of Fiduciary Duty): $70,000,000 or more in actual damages, plus punitive damages and court costs and attorneys' fees.

4. COUNT FOUR (Conversion): $70,000,000 or more in actual damages, plus punitive damages and court costs and attorneys' fees, plus a full and complete accounting.

5. COUNT FIVE (Contribution): corresponding judgment in favor of Kunimoto against Carlsmith and Starshak for amounts owed BOH as a result of legal malpractice of Carlsmith and Starshak, plus court costs and attorneys' fees.

6. COUNT SIX (Imposition of Constructive Trusts): imposition of involuntary constructive trusts against Fidell and BOH as involuntary trustees in favor of Kunimoto as beneficiary commensurate with amounts wrongfully taken and withheld from him and the profits generated by their wrongful appropriation and use, plus court costs and attorneys' fees.

7. COUNT SEVEN (Willful Breach of Contract To Provide Estate Planning Services): $70,000,000 or more in actual damages, plus punitive damages and court costs and attorneys' fees.

8. COUNT EIGHT (Intentional and Grossly Negligent Infliction of Emotional Harm): $1,000,000 or more in actual damages, plus punitive damages and court costs and attorneys' fees.

9. COUNT NINE (Civil Conspiracy To Interfere with Due Process of Law and Constitutional Fair Trial Rights): $70,000,000 or more in actual damages, plus punitive damages and court costs and attorneys' fees.

10. COUNT TEN (Punitive Damages): punitive damages in a multiple of at least five times actual damages and court costs and attorneys' fees.

9. Order Granting Defendants' Motions To Dismiss, Civil Nos. 98-00453 & 98-00475.
filed October 7, 1998

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

The court heard Defendants' Motions on October 5, 1998. Gary Victor Dubin, Esq., and Gregg Young, Esq., appeared at the hearing on behalf of Plaintiffs; Katherine G. Leonard, Esq., appeared at the hearing on behalf of Defendant Bank of Hawaii; Ke-Ching Ning, Esq., appeared at the hearing on behalf of Defendants Carlsmith Ball and James L. Starshak; Harvey E. Henderson, Jr., Esq., appeared at the hearing on behalf of Defendant Jay M. Fidell; and Robert Fans, Esq., appeared at the hearing f or Defendant John Candon. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendants' Motions to Dismiss and DISMISSES Plaintiffs' Complaints and Actions with Prejudice.

BACKGROUND

On June. 3, 1998, Plaintiff Allan .R. Kunimoto ("Kunimoto") filed a lawsuit against Defendants Bank of Hawaii ("the Bank"), its attorneys Carlsmith Ball Wichman Case & Ichiki ("Carlsmith"), the state court-appointed Receiver, Jay Fidell ("Receiver"), and the bankruptcy court-appointed Trustee, John Candon ("Trustee"). Kunimoto's Complaint alleges claims for 1) wrongful execution; 2) racketeering violations; 3) breach of fiduciary duty; 4) conversion; 5) contribution; 6) imposition of constructive trusts; 7) willful breach of contract to provide estate planning services; 8) intentional and grossly negligent infliction of emotional harm; 9) civil conspiracy to interfere with due process of law and constitutional fair trial rights; and 10) punitive damages. On June 4, 1998, Kunimoto' s wife, Jean Meiko Kunimoto, filed an essentially identical Complaint, adding loss of consortium claims.

The underlying facts in the instant case arise from a series of loans made by the Bank to Kunimoto. When Kunimoto failed to timely repay the loans, the Bank instituted foreclosure actions in state court against him. In response, Kunimoto filed "lender liability" counterclaims against the Bank alleging wrongdoing in conjunction with the Bank's attempts to "workout" repayment of Kunimoto's defaulted loans.

While investigating the foreclosure action, the Bank discovered that Kunimoto had transferred millions of dollars in real property to his wife and other family members, that he had transferred proceeds from the Bank's collateral into one of his wife's accounts, and that he attempted to transfer income from his medical practice to his wife. The Bank filed a fraudulent transfer action against Kunimoto and his wife. This action was consolidated with the foreclosure actions (hereinafter "the Consolidated Action"). At trial, the jury found in favor of the Bank on the debts, the lender liability counterclaims, and the fraudulent transfers.

A separate action was also brought in state court against Kunimoto by the Bank to foreclose on the Ahiki Street property ("the Ahiki Street Action"). Deficiency judgments were entered in favor of the Bank. The state court appointed Defendant Jay M. Fidell as Receiver to aid in executing the Bank's judgment.

On September 26, 1997, during the middle of the Consolidated Action, Kunimoto filed for bankruptcy. Defendant John Candon was appointed by the Bankruptcy Court to serve as Trustee.

Separate motions to dismiss have been filed by the Bank, Carlsmith, the Receiver, and the Trustee[1]. Because these motions implicate the same issues, they are treated as one for purposes of this Order.

DISCUSSION

Defendants maintain that Kunimoto's Complaint must be dismissed for several reasons, including lack of standing, lack of subject matter jurisdiction, collateral estoppel, failure to state a claim, failure to comply with local rules, failure to obtain permission from the bankruptcy court to sue the Trustee, and issues of immunity regarding both the Trustee and the Receiver. The court considers the issue of standing first.

Defendants argue that Kunimoto and his wife lack standing because the claims alleged in Kunimoto's Complaint are part of the bankruptcy estate. Defendants are correct that neither Kunimoto nor his wife has standing to bring these claims.

[1]The Receiver's motion is, alternatively, one for summary judgment. For this reason, Plaintiffs may not unilaterally dismiss the Complaints.

When Kunimoto filed his bankruptcy petition, a bankruptcy estate was created. The Ninth Circuit, in Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705 (9th Cir. 1986), recognized that 11 U.S.C. § 541(a) (1) defines property of the bankruptcy estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." The United States Supreme Court has likewise explained that the scope of section 541 is broad, and includes causes of action. United States v. Whiting Pools. Inc., 462 U.S. 198 (1983)

Pursuant to Bankruptcy Code § 541(a), once an estate is created, all claims which the debtor has or may have at the time the bankruptcy petition is filed become property of the estate. 11 U.S.C. § 541(a). The estate includes, not only claims which are based entirely on pre-petition events, but also claims which arise out of events that occurred post-petition but prior to the debtor's

discharge. Stanley v. Sherwin-Williams Co., 156 B.R. 25, 26 (W.D. Va. 1993); In re Osborn, 176 B.R. 217, 219 (Bankr. E.D. Okla. 1994), aff'd, 83 F.3d 433 (10th Cir. 1996); In re Acton Foodservices Corp., 39 B.R. 70 (Bankr. D. Mass. 1984).

Therefore, upon filing for bankruptcy, standing to prosecute any of the estate claims passes from the debtor to the trustee. See. e.g.. Carlock v. Pillsbury Co., 719 F. Supp. 791 (1989) (cause of action is property right which passes to trustee in bankruptcy; on filing petition for bankruptcy, debtor loses standing to pursue any claims as those claims become part of bankruptcy estate).

In opposition, Kunimoto makes several arguments. First, he contends that it would be futile to request that the Trustee bring this action because Kunimoto's motion to discharge the Trustee for wrongdoing, based in part on the Trustee's failure to sue the Receiver, is pending before the Bankruptcy Court. Kunimoto insists that if this court concludes that Kunimoto lacks standing, the appropriate response should not be to dismiss the Complaint, but rather to grant leave for Kunimoto to substitute the Trustee as Plaintiff. Kunimoto argues that if the Trustee refuses to do so, this merely adds to the reasons why he should be removed as Trustee.

Although Kunimoto requests that the court grant leave to substitute the Trustee as the proper Plaintiff, such substitution cannot occur in this case because the Trustee would impermissibly become both Plaintiff and Defendant in the same action. Further, the Trustee has neither requested nor consented to be substituted as Plaintiff in this action.

In a further effort to avoid dismissal, Kunimoto alleges that the Trustee has abandoned the claims. Abandonment of estate property is governed by 11 U.S.C. § 554. Section 554 requires notice and a hearing before a trustee may abandon property of the estate that is burdensome or of inconsequential value and benefit. See,

e.g., Sierra Switchboard Co., 789 F.2d at 709-10 (abandonment may not occur without notice by trustee to creditors); Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132 (4th Cir. 1988) (before debtor or creditor may pursue claim which is property of bankruptcy estate, there must be judicial determination that trustee has abandoned claim). Mere inaction by the bankruptcy trustee does not equal abandonment. In re Prospero, 107 B.R. 732 (Banker. C.D. Cal. 1989). Because there has been no judicial finding of abandonment and no notice to creditors, the court finds the Trustee has not abandoned the claims.

Kunimoto next argues that because the taxes that the Trustee allegedly failed to pay are not dischargeable in bankruptcy, he retains standing because he faces substantial personal harm. In particular, Kunimoto states that he "would be adversely impacted were the Trustee to be thought to alone control his defensive claims and defenses." Kunimoto offers no support whatsoever to defend this position. If his position were correct, the debtor in a bankruptcy case would always retain the right to bring claims regarding estate property because every debtor is subject to the possibility that his debts will not be discharged. The Bankruptcy Code forecloses Kunimoto's argument by vesting all legal claims in the estate. Where Congress has provided no exceptions, none will be created by this court.

Elsewhere in his Complaint, Kunimoto implies that the bankruptcy court authorized him to pursue these claims by lifting the automatic stay. The bankruptcy court, however, made it clear that the stay was lifted only to permit the state court to continue the trial which was in progress when Kunimoto filed for bankruptcy. The bankruptcy court did not authorize Kunimoto to file new lawsuits based on claims that belong to the estate.

Finally, Kunimoto claims that his wife is entitled to sue because she is not in bankruptcy. Because her claims

are derivative of claims of the estate which Kunimoto has wrongfully asserted, her claims must be dismissed as well.

Because every claim alleged by Kunimoto originated before he filed for bankruptcy or during the course of the Chapter 11 phase of his bankruptcy case, he and his wife lack standing. Therefore, because only the Trustee has standing, both Kunimoto and his wife's Complaints are hereby dismissed.

As a final effort to avoid dismissal, Kunimoto argues that the claims should be transferred to the bankruptcy court rather than dismissed. However, Kunimoto's reliance on this court's decision in Alvaro v. Bank of Hawaii, et al., CV No. 96-00127 DAE, is inapposite because, in that action, standing was not at issue. While the claims in Alvaro's complaint were referred back to the bankruptcy court, Alvaro claimed to be filing a counterclaim which was intrinsic to the bankruptcy proceedings. In Kunimoto's case, he propounds what he entitles an entirely new claim based on the state court's unfair decisions in the Consolidated Action and Defendants' role therein. Because these allegations are not intrinsic to the bankruptcy proceeding and because the issue of standing prevents further litigation of these claims, the court need not refer Kunimoto's claims to the bankruptcy judge.

The court notes that although Defendants have raised numerous other valid grounds for dismissal[2] the court need not address these in light of Plaintiffs' lack of standing.

[2] The court recognizes that Plaintiffs did not obtain permission from the bankruptcy court before bringing suit against the Trustee, did not comply with Federal Rule of Civil Procedure 9(b) 's specificity requirement, and did not comply with Local Rule 9.1 regarding filing of a RICO case statement. The court also notes that the Trustee and the Receiver raise immunity defenses because they are being

sued in their official capacities. Moreover, the doctrines of res judicata and collateral estoppel likely prohibit the bringing of most of Plaintiffs' claims, in that the same issues raised in Counts One, Three, Four, Five, Six, and Seven were previously adjudicated in state court. Finally, to the extent that Plaintiffs allege a deprivation of "constitutional fair trial rights" in Count Nine, such a claim is not properly aimed at the named Defendants.

CONCLUSION

For the reasons stated above, the court GRANTS Defendants' Motions to Dismiss and DISMISSES Plaintiffs' Complaints and Actions with Prejudice.

IT IS SO ORDERED. /s/ DAVID ALAN EZRA

DATED: Honolulu, Hawaii, October 7, 1998.

10. Transcript of Proceedings, November 30, 1998, Defendants' Motions For Sanctions, Civil Nos. 98-00453 & 98-00475

MONDAY, NOVEMBER 30, 1998 9:50 O'CLOCK A.M.

THE CLERK: Civil 98-453, Alan Kunimoto versus Jay Fidell. And Civil 98-475, Jean Mieko Kunimoto versus Jay Fidell. This hearing is called on Defendant's Motion for Sanctions.

MS. LEONARD: Good morning, Your Honor. Katherine Leonard for defendant Bank of Hawai'i.

MR. FARIS: Good morning, Your Honor. Robert Faris for defendant John Candon.

MS. NING: Ke-Ching Ning on behalf of James Starshak and Carlsmith Ball.

MR. HENDERSON: Harvey Henderson for defendant Jay Fidell. Also with me is Scott Batterman from Mr. Fidell's law firm.

MR. DUBIN: Good morning, Your Honor. Gary Dubin and Gregg Young appearing for the plaintiffs.

THE COURT: All right. We've received substantial submissions really from both sides, and my view is that additional rancor in the form of allocution will be of very little, if any, benefit to the court.

Rule 11 is based entirely on the written submission, not oral pronouncements of counsel; so it relies directly upon the record. And the question is whether what was done meets the appropriate high bar for imposing sanctions.

The one issue which regrettably was raised by Mr. Dubin, not in his appropriate response but in his kind of a reply to his own motion for sanctions, was the issue of and I believe for the first time the question of whether he offered to dismiss this complaint without prejudice at a very early stage, which offer was rejected. And then that raises the specter of whether, in spite of all of the other activity that Mr. Dubin engaged in, he is relieved of responsibility since he did act during if that is sufficient -- during the safe harbor period.

Now, I'll let the and that's really what I want to confine argument to today because the rest of it is entirely in the record, and I don't need to have any further allocution from either side on it.

So you can move forward.

MS. LEONARD: Thank you, Your Honor. Can the court hear me if I stay here?

THE COURT: Yes, as long as you speak up.

MS. LEONARD: Your Honor, I think we have presented to the court in our initial reply memorandum the correspondence between Mr. Dubin and myself at the

beginning of September, which was at the very expiration of the 21-day period. It was the week ending September 2d or 3d, I believe.

Mr. Dubin's offer of dismissal was equivocal at best, Your Honor. I just received this morning an errata to plaintiffs' November 26, 1998 filing, filed at 11:59 P.M. Saturday night, which, among other things, includes Mr. Dubin's September 2d letter to me. In that letter he says, "Meanwhile, with regard to your Rule 11 sanctions motion our position again is that it is frivolous and that by rejecting our offer to withdraw the complaints and now preventing us from doing so without meeting your dismissal-with-prejudice condition, your client has forfeited any right it now has to file the same.

"Mr. Young and I with our clients, as a result of your unwillingness to cooperate with us, are reviewing our decision and our options at this time, and, unless we learn by the close of business this week that your client's position has changed, we will proceed to effectuate our clients' desires with appropriate court filings, regrettably without your cooperation."

THE COURT: Well, he still says there -- he reiterates there that he's willing to dismiss this complaint without prejudice.

MS. LEONARD: Your Honor, in order to -THE COURT: So it's a question of law. I mean,

if someone is willing to dismiss their infringing pleading without prejudice, does that obviate Rule 11 sanctions?

MS. LEONARD: Your Honor, I would say that Rule 11 itself does not speak directly to that. THE COURT: No, I know.

MS. LEONARD: There is comments in -- to the advisory committee notes which say that the withdrawal can

be formal or informal. All Mr. Dubin had to do was file a motion to dismiss, and then we could have presented that argument to this court. I invited him to do so in my letter dated September 4th before I finally filed the motion. In that letter I said to him, you know, "Your letter equivocates. You're reviewing your options. You've refused to reimburse the fees and costs incurred by the bank in filing the frivolous complaints. You refuse to sign the stip to dismiss without prejudice. Yet, you have not moved to dismiss this case." And I said at that time, unless there's a concrete demonstration that dictate another course of action, we'll go ahead and file the motion for sanctions.

The notice period ran on Monday of that week. That entire week we were in discussions, and he went back and forth, saying he would dismiss the cases but not doing so, not filing a notice of dismissal, whether that would have been effective or not, not filing a motion to dismiss, and sending us equivocating letters, meanwhile threatening to file further suits.

And I would say, Your Honor, that this issue cannot be addressed in a vacuum in this case. The facts of this case are egregious, and they stem for years. We have had --

THE COURT: I understand that. I understand what your situation is. But you have to remember that Rule 11 addresses itself very narrowly only to written filings with the court which are baseless, frivolous, or are willfully inaccurate.

MS. LEONARD: And on its face we believe the complaints filed in this case were frivolous. We believe we gave Mr. Dubin and Mr. Young the proper period to take action and that they did not take unequivocal action and that they continued at the end of the notice period, the 21 notice period, not to take any action.

And while the advisory committee notes suggest that formal or informal action may be sufficient, under the circumstances of the case and given the tenure of the correspondence -- which at the same time says, well, we would do it, but, on the other hand, we're going to sue you again. Under these circumstances they shouldn't be let off the hook because they made it perfectly clear the reason they were doing it without prejudice is they were going to merely do it again later. They were going to file these same complaints later. They were going to file them in some other court. They were going to do something else.

Your Honor -- and I understand you want to limit it to this point, but from the Bank of Hawai'i's point of view to simply -- I mean we actually prepared the stipulation and sent it over to him. Although it did say with prejudice, we gave him an opportunity to send one back or file a motion or do something. And he didn't do it. And at this point, Your Honor, it would have behooved counsel to take clear and unequivocal steps if they wanted to avoid these sanctions.

THE COURT: All right. Well, let me say that the fact that I'm limiting oral argument today to this issue doesn't mean I'm not going to consider the other issues that are raised. I said that -- I thought fairly precisely at the beginning of this morning's session that what I intend to do is to take into consideration, as I have, all of the written filings which have been made, but because they are so extensive and so complete it's unnecessary for me to have them replayed here on the record. That doesn't mean I'm not going to take them into consideration.

MS. LEONARD: Thank you, Your Honor. And I appreciate that and the Bank of Hawai'i appreciates that.

The bank finally brought this Rule 11 motion because it really believes that this court is the only place it can get the kind of relief that is warranted here. Somebody needs to send a message to this particular set of attorneys and counsel and clients that this is not okay. There's really

not another good avenue. Mr. -- and I don't -- I will heed this court's warning. I will not get into those other grounds. But the Bank of Hawai'i is looking to the thoroughness and astuteness of this court in addressing these matters.

THE COURT: All right. Anybody else over here that wishes to add anything different?

MR. FARIS: Your Honor, I'd like to add something because my client's position is a little different due to the timing.

I did receive a copy of Mr. Dubin's letter to Miss Leonard of September 2 in which he said that he had made an offer to dismiss the complaint without prejudice but that offer had been turned down by the bank. And then he turned to scenarios under which the complaint could be dismissed with prejudice. At that time the trustee had not filed a Rule 11 motion. I read Mr. Dubin's letter as essentially withdrawing the offer to dismiss without prejudice, and I think a week or so after that filed my own motion for Rule 11 sanctions. There was no written offer after that date, after the filing of my Rule 11 motion, to withdraw the complaint as to the trustee or as to anybody else.

Now, Mr. Dubin has given counsel copies of a chronology, which says that at two hearings on September 23d and October 5th there were offers made to dismiss without prejudice. I don't recall an unconditional offer to dismiss without prejudice at any time after I filed the trustee's Rule 11 motion. So, Your Honor, at least with respect to the trustee I don't think the safe harbor conditions were met.

I'd also like to, if I might, Your Honor, address the three new cases that were cited in the memo that Mr. Dubin faxed to counsel on Thursday, last Thursday.

THE COURT: All right.

MR. FARIS: All those cases don't support the plaintiffs' position, Your Honor. In the Dee-K case during the 21-day period the plaintiff filed a motion to amend its complaint, and the amended complaint dropped the claims that allegedly offended Rule 11. The court said that filing that motion to amend constituted a withdrawal. No motion to do anything was filed in this case.

In the Nagle versus Ford case similarly the plaintiff filed a motion to dismiss during the 21-day safe harbor period. Now, that motion was denied because the court held it was filed too late and there was a substantive motion pending. But, nevertheless, the court said that filing that motion was sufficient to invoke the safe harbor. There was no motion again in this case.

In the Succession Picasso case that's the only case where an offer, apart from a motion, was treated as sufficient to invoke the safe harbor. And there the offer was to dismiss with prejudice, not without prejudice. I think that's a significant difference, Your Honor, because, if dismissing a case without prejudice is sufficient to invoke the safe harbor, it creates the possibility that a frivolous complaint can still be used as leverage, can still be used to extract something for settlement. Anything short of an offer to dismiss with prejudice should not be treated as sufficient to invoke the safe harbor.

Thank you.

MS. NING: I just want to add only a word with respect to the question of law concerning what abandonment of a claim under Rule 11 means. While it does not specifically address that question, the Dee-K case cited by the plaintiffs in particular indicate that the abandonment of a claim has to be in itself indicated clearly. In that case, as Mr. Faris indicates, there was a motion to amend the complaint, which meant that the plaintiffs in that case were no longer insisting on their positions. In this case they did insist quite strongly on their positions throughout.

THE COURT: Thank you.

MR. HENDERSON: Very briefly, Your Honor. I think one has to look with reference to Rule 11 as to the nature of the document being complained of. As plaintiffs' counsel stated in his memo, the selective imposition of such sanctions and their amount are thus left at the discretion of the trial judge on a careful case-by-case analysis.

I think that's particularly important in this case because the offending documents, if you will, are the complaints themselves, not a motion, not an affidavit or something like that, as is often the case, or for that matter even a count in a complaint, which can be easily dismissed. These are the complaints themselves.

The court is somewhat aware of the history of litigation of these parties. Under the circumstances of this case I think the defendants were more -- assuming this would happen -- would be more than adequately correct to say -- to require a dismissal with prejudice. Otherwise, as counsel has said, these complaints would have come up again. Now, frankly, even a dismissal with prejudice may not guaranty that, but at least it's a lot more than a dismissal without prejudice.

So I would submit to the court you have to look at the specific instances of this case. The court has some knowledge of the history of the litigation. And I think under those circumstances the demand that the complaints be dismissed with prejudice is an appropriate response to the safe harbor provision, especially if you take into consideration what the framers of the rules were trying to do. They were trying to say, "Okay, Mr. offending attorney, we'll give you 21 days to get rid of this offensive document," whatever it is. And in some instances a dismissal without prejudice would be perfectly appropriate. In this case I would say it would not.

I would also like to quickly point out the letter offering to dismiss the complaints went to Miss Leonard with ccs to the rest of us. I, like Mr. Fans -- and it was already history at that point. I, like Mr. Fans, interpreted that as a done deal; that there was no further consideration. There was certainly never an equivocal offer addressed to me, either orally or in writing, during the 21-day grace period for our motion, which was a few days later than Miss Leonard's. Mr. Dubin never called me. The only thing I had was a cc of a letter to Miss Leonard saying I offered to withdraw without prejudice and you've rejected that. Now, I don't think that's enough under Rule 11.

THE COURT: Well, did you ever reject any offer?

MR. HENDERSON: I never had an offer to reject. I had no communication with Mr. Dubin whatsoever.

THE COURT: So arguably -- ironically, the only party in this case that ever had an offer susceptible of rejection would be the Bank of Hawai'i.

MR. HENDERSON: Well, once again, the rule doesn't require absolute specificity. Was I aware that an offer had been made to the Bank of Hawai'i? Yes, I was. But there was never any offer made to me.

THE COURT: All right, Mr. Dubin.

Now, I've confined them to one issue. You are confined to the same issue. I see you walking up here with charts and --

MR. DUBIN: Your Honor, what I have done is I've prepared a chronology of events that I think is helpful, particularly in terms of the focus that you've provided for this hearing. And I've provided counsel with copies of them. They've referred to it in their oral argument.

THE COURT: If that's what you're doing to argue that's what the chart is, that's fine.

MR. DUBIN: That's right. And, if I could approach the bench, I'd like to give Your Honor a copy of it. All these dates are in the record.

I am going to confine my remarks, Your Honor, to the precise issue which you have appropriately targeted.

But let me point out in our memorandum in opposition to Defendant's Motion for Rule 11 Sanctions, filed November 12th, 1998, on page 6 I did raise the issue of the safe harbor provision, quoting from the exact September 2d letter which had been earlier placed in the record in opposition to the dismissal motions, which at that time were combined with the motions for sanctions.

I submit, Your Honor, as a matter of law there is no district court in the United States who would grant sanctions against plaintiffs and their attorneys in this case. But I add that I doubt there is a district court in the United States that wouldn't grant sanctions on behalf of the plaintiffs against the defendants and their attorneys.

These two controversial complaints were filed on June the 3d and the 4th, 1998. And I just wish to call to the court's attention and remind you that we filed the Dr. Kunimoto complaint with a motion to recall -- to withdraw the reference, cognizant of the affairs in the bankruptcy court, as we were, and Your Honor's decision in that case essentially pulled the rug out from under our position in the first filing.

The two actions were consolidated. Without any word from the other side at all they all filed in rapid succession their motions to dismiss. If Your Honor has occasion to relook at those motions to dismiss, you will see that the Bank of Hawai'i played the lead role in all of this, and they copied almost all of their presentation.

Now, in addition to the letters that exist between counsel I had constant communications almost on a daily basis with Miss Leonard. I don't tape-record my conversations; so I can't present those to the court. Also with Mr. Faris, particularly throughout the month of August when I was trying to engineer what looks like now hopefully will be a global resolution of these issues in the bankruptcy court. Although, I did not talk to Mr. Henderson, I did talk to Mr. Batterman. And, as he will recall, I assured him that we wanted eventually the dismissals with prejudice to include his client because he was down in the dumps because the original filing in bankruptcy court didn't include his client. And I assured him that it was the intention to include everybody.

During August 1998 we had settlement discussions where, frankly, I tried to break the logjam to get these people to resolve all of these problems. Mr. Painter, the bankruptcy attorney for Dr. Kunimoto, was away the whole month of August; so we couldn't get the plan out until the first part of September. But the plan, which is on the agenda on January 19th, 1999, Judge Lloyd King's agenda, that dismisses everything, including these claims, with prejudice. To the extent that there is an author of that plan, it is I.

At the end of August 1927 (phonetic) I had several conversations with Mr. Fans about withdrawing the complaints and with Miss Leonard. The letter of September 2d and her letter to me of September 1st, which is in the record in one of these papers, references those conversations, which took place before the 21 days on their informal Rule 11 filing had been complete. At that time I told them we were going to voluntarily withdraw the actions. We thought it was conducive to the settlement that we were purporting, that we were sponsoring.

Unless there be any doubt in the court's mind as to how district courts in the United States interpret Rule 11, I call to the court's attention Hockley versus Shan Enterprises, Limited Partnership, 19 F. Supp. 2d 235, which

I just saw yesterday, decided a couple of months ago, August 5th, 1998. And the court points out that a party is not required to both withdraw its position and make a candid acknowledgement to avoid Rule 11 sanctions. Withdrawal alone is sufficient.

The district courts of the United States do not hold that we have to kowtow and put our head and our arms in the stocks and have tomatoes thrown at us. It was sufficient at the end of August that I notified Miss Leonard, and through her everybody else -- and they knew what was going on -- that we wanted to dismiss these complaints. And, in fact, they would have been dismissed that day but for Miss Leonard's astute observation that we couldn't because Mr. Henderson on behalf of Mr. Fidell had also asked for summary judgment, therefore blocking our ability to voluntarily withdraw.

Now, the three cases that I cited to Your Honor, particularly Nagle Industries versus Ford Motor Company, which was misidentified by Mr. Fans, there there was a dismissal without prejudice. The cases that I cited to the court -- and there are no other cases contrary to this in the district courts of the United States -- that an informal offer to withdraw is the end of the matter because since the 1993 amendments courts did not want to have their time consumed, for example, with what's been going on here.

At the end of August, when the offer was made informally to dismiss, that should have been the end of it. But, when counsel feels they have a fish on the end of the hook, despite the rules they've shown the proclivity in this case to try to reel the fish in. Therefore, on 9/2/98 I instructed -- I told Miss Leonard we wanted to withdraw. Now, there was no need for us to file a motion to withdraw because the motion -- excuse me. To dismiss. Because a motion to dismiss had already been filed. In our paper, filed 9/23/1998 in this action -- I believe it was page 21 -- we point out that we're in favor of withdrawing these complaints without prejudice.

Now, Mr. Young and I could not withdraw these complaints with prejudice. Our clients were opposed to it. We don't have the authority to effect withdrawals with prejudice if our clients are opposed to it.

Seizing another opportunity adroitly to get us -it's not intended as a rancor. It's intended as a clear statement of the facts -- Miss Leonard then applauds our clients for being the victims of Mr. Young and Mr. Dubin, when in fact the court now knows the opposite: my clients' declaration that they refused to dismiss these cases with prejudice.

And then at the hearing Your Honor will remember -- and I have this marked as October 5th, 1998 -I had a discussion with Your Honor, and I told Your Honor we're in favor of dismissal without prejudice. And Your Honor in this very courtroom said, "Well, Mr. Dubin, you know that I am going to consider dismissal with prejudice." Well, that's fine. But the whole dispute after the end of August 1998 was a distinction between dismissal with prejudice or a distinction without prejudice. And, as the district court of Virginia, Eastern District, said in the Dee-K Enterprises case in 1998, "Plaintiffs rightly note that Rule 11 requires only that the nonmovant withdraw the paper, not that it be done with prejudice."

So Mr. Young and I were in a special situation. Our clients didn't want us to withdraw with prejudice, but we continued to offer to withdraw with prejudice.

In fact, the sanction motions are just perpetuating needless activity. I don't believe my clients intend because of the nature of what's happening in the bankruptcy court to even file a notice of appeal on the dismissal with prejudice now because even Miss Leonard has acknowledged to me that it looks like the plan will be approved by everybody. That's coming up January 19th. Ironically, that's a dismissal with prejudice of all claims. But, if Your Honor were to grant Rule 11 sanctions, we would be -- Mr. Young and I and our

clients would be forced into the position of continuing to defend our position on appeal in another forum after --

THE COURT: Well, let me assure you, Mr. Dubin, that there are no decisions that are made in this court based upon whether I'm concerned one way or the other as to whether someone it going to appeal. Virtually every decision I make on this bench today -- because it's so inexpensive to appeal these days and because of the kind of tenor of the bar on these issues -- we get appealed in almost every case. So, if I were to make decisions one way or the other based upon some concern that somebody might appeal my ruling, I think that would be a very poor representation of a United States district judge. I don't do that. I never did it, won't do it, and so I'm not going to be concerned.

If you're liable for Rule 11 sanctions, you will be -- they will be imposed. If not, they will not. But, regardless of whether there is some specter of appeal, that is of no interest to me. That's a concern for the Ninth Circuit.

MR. DUBIN: That's not the issue I'm addressing. I'm addressing the issue that in late August I informed the defendants that we wanted to dismiss with prejudice. I was told, "No, you can't do that -- without prejudice. Sorry. "No, you can't do that. It has to be with prejudice. Here's a stipulation. Well, we can't sign that."

THE COURT: Well, they say -- Mr. Dubin, their suggestion is that you're saying, well, you know, we're not going to -- in the same breath that you suggested to them that you would dismiss without prejudice you also threatened to file further claims against them. I mean you can dismiss without prejudice and turn right around and file another law suit.

MR. DUBIN: That is not true, Your Honor.

THE COURT: That isn't true.

MR. DUBIN: No. The only additional claim was that I was defamed by the filing of documents that had been taken during litigation by the Carlsmith firm because of an inadvertent disclosure of privileged materials by Mr. Young at a time I was not in the state. And that was paraded here in an absolutely despicable manner in the papers. And I told them that, if that continued, I would file suit personally. Other than that there is not one suggestion, Your Honor --

THE COURT: Mr. Dubin, it must not have been too despicable because I don't remember it.

MR. DUBIN: Well, to your credit, then. But this was a thing with Judge Real being given an introduction to Dr. Kevorkian.

THE COURT: Okay. All night. Now you reminded me. I had forgotten entirely, Mr. Dubin, and you've refreshed my recollection on it.

MR. DUBIN: With the exception of that there was no reference to any further claims being filed, none whatsoever.

In all of the papers -- all the papers filed and in this court and the hearing and the record of that hearing on October the 5th I told the court we wished to voluntarily dismiss the actions. There was never any equivocation. There were never any threats of any additional claims. To the contrary. I kept reminding the court that this matter was in the process of being resolved; all claims were being resolved in the bankruptcy court. And in the hearing I attended Judge King had expressed a desire to save money on all litigation scenes. In fact, on our side we ceased all litigation, we got extensions on briefs, et cetera. And the other side did the same thing, except in relationship to this United States District Court consolidated action, which was because of the blood thirsty nature of the opposing counsel on the issue of Rule 11.

So everything is to the contrary. You'll find nothing in the record that says we threatened anybody with any additional claims.

The only claims, of course, are our counter motion because we believe that every minute of our time, every piece of paper, and every minute of this court's time and its clerk's time since the end of August 1998 occurred after, as these other district court cases state, the motion should not have been filed with the court. That's from the Dee-K Enterprises opinion.

And that's why, Your Honor -- going back to what I was saying earlier, that's why I mentioned the appeal. Not that it would affect you, but that we have been pushed into a multiplicity of paperwork, a multiplicity of hearings, and we'll be pushed further for no possible intelligent reason and against our intentions, both in writing and the oral discussions which are referenced in Miss Leonard's September 1st letter, which is also somewhere in the record.

THE COURT: I think that covers it, Mr. Dubin.

MR. DUBIN: Well, last point was somebody said that you needed -- this court needed to send a message. I think the advisory committee knew Rule 11 already sent a message. The message has not been heard yet by all the attorneys in this court.

THE COURT: All right. Well, I am going to look very carefully at the legal issue as to whether Mr. Dubin's somewhat equivocal but nonetheless offer of dismissal without prejudice suffices to meet the requirements of the safe harbor provision of Rule 11 as the Rule 11 has been, you know, been amended.

I will say this, though, Mr. Dubin, going beyond Rule 11 directly, there was, and in my view, absolutely no basis for the suit that was filed legally. That's something you knew

or you certainly should have known because th law is well-settled in this circuit. I mean I think one of the problems that we have here is that you have a rather skewed version of what constitutes the law. You make that abundantly clear when you suggest that the law in the Ninth Circuit in one of your filings, I believe one very recent filing, you say, well, something -- and I paraphrase -- the law in the Ninth Circuit may be this way, but it isn't national law until the Supreme Court rules on it because in your view there are cases that go other ways in other circuits.

The fact of the matter is, Mr. Dubin, as f an as you and I are concerned, as f an as anything you file in this United States District Court is concerned, the Ninth Circuit controls, unless there is a United States Supreme Court decision to the contrary. That is the way our legal system is and has been for much longer than either you or I have been alive, let alone practiced law.

Now, you went to a good law school. My recollection is that you were either a classmate or at the University of Michigan law school at the same time that our late colleague Judge Fong was there. And I know that the University of Michigan law school teaches that, when you have subsisting law within a circuit, the courts of that circuit and the lawyers of that circuit filing federal cases are bound by that decision unless and until the circuit reverses itself or the Supreme Court reverses the circuit. Your hope or your wish that you believe some other circuit has got a different view does not constitute the law.

Now, in the ultimate end of things it may be that the Ninth Circuit is reversed. It may even be that the Ninth Circuit in a subsequent en banc decision or in an en banc decision from a panel may change the law. That happens, and it happens often enough so that we have to very carefully monitor decisions. And that's part of the system as well. But until that is done -- and it hasn't been done in anything involving this case -- the law of the land with respect to this United States District Court and every other

United States District Court and every other lawyer within this circuit is the United States Court of Appeals for the Ninth Circuit. And, if they have ruled on an issue, that is the law that must be followed, not the hope that maybe some other circuit who's got a contrary view in your opinion might prevail at some point in a decision by the United States Supreme Court.

That may be great for academics -- and I teach federal courts now at the law school. I used to teach remedies, but I've taught federal courts now for the last several years, and I certainly am aware of cases in which the Ninth Circuit has been reversed by the Supreme Court and other circuits have been followed. I'm also aware of cases in which the Ninth Circuit has been affirmed and other circuits have been reversed. But until that happens you, as long as you practice here as a lawyer, are bound by Ninth Circuit law, and you are responsible to know it.

Now, you portray yourself as a victim. You're always the victim, Mr. Dubin. Unfortunately, you are not a victim unless you are a victim of your own actions. This court has never in the past nor will it in the future treat you any differently than any other licensed attorney that comes before me. You have always in the past been treated fairly, and you will continue to be treated fairly and without prejudice or any type of predisposition.

But, when you come in here with this -- and you've argued it here, and that's why I raise it. You claim to be the victim. You use words like "blood thirsty" and all other kinds of machinations and adjectives. Now, I don't know what occurred, and I don't care to know -- and I really had forgotten what occurred between you and Judge Real. That is of absolutely no moment to me. When a lawyer comes in here, they come into this court with respect to cases they are bringing here. They are here to argue that case. They are not the client; they are the advocate.

But they are also, as you are and as every other lawyer in this courtroom is, a substantive officer of this court, responsible for upholding the dignity and the majesty of the law and of this court. I would say that, although I am a federal judge and therefore hold a somewhat different position, in reality I can do very little to maintain the dignity of this court in the face of lawyers who act in an undignified fashion, either as between themselves or in their own conduct.

I think that you need to very carefully reassess your own view of your relationship with the court, with your colleagues in the bar, and with your clients. When you take a client on, Mr. Dubin, your job is to zealously and actively represent their interest. Your job is not to recklessly and with abandon advocate their position. I'm afraid that you did that in this case.

Your zeal to represent the Kunimotos led you to file pleadings in this case which were baseless, frivolous, and without foundation. You're a better lawyer than that, and you're smarter than that. And I think that you need to really step back carefully and to take a good, hard, as we say in the law, second look at the way in which you are, and have of late been, practicing, at least in this case. Because there's no reason why someone with your talent -and you are a talented lawyer in my view -- cannot have a successful, perfectly within the bounds of propriety and ethics and responsibility practice before this court. You don't need to come in the way you came in in this case.

In the end, in the final analysis, no one who practices that way even succeeds. They may succeed in the short run. They may win settlements out of opposing clients' frustration and aggravation with the process. But in the end their reputation always precedes them.

I work very hard, Mr. Dubin, very hard to make sure that I never in my dealings with lawyers take any preconceptions into account in making rulings or in dealing

with them personally. I will tell you that human beings, being as they are, that isn't the case with every judge in either this Federal District Court or in the state courts. And, in spite of the fact that we're a big city in Honolulu, our legal community is still relatively small.

The downside for you in continuing this kind of practice is that eventually you will have lost all credibility, and that will damage your practice and it will damage your clients. It's happened to others. And eventually, as always happens, eventually you'll step too far over the line, and a technicality may not preserve you from sanctions, dismissal, or disbarment.

It's not too late for you, I don't think, because, as I said before, you're not a stupid man. You've had some difficulties in your life. You've had some terrible personal tragedies for which I have the greatest sympathy, and you've had some other difficulties that you've had to deal with in a legal sense. But you've been reinstated. You're practicing here. And you're entitled to the same respect and regard as any other member of this bar. And you'll get it from this court.

But I demand something of every lawyer who comes here -- you included -- and that is a very high standard of professional practice, consistent with the gift we've been given: the great ability to be here as advocates and lawyers. We're truly privileged, Mr. Dubin, to have that opportunity.

I just received a letter from a lawyer who's about to lose his license permanently as a result of his being involved too carefully with his clients in an inappropriate and illegal way. Just went too far. He'd been kind of shading the line for some time, and this time he just went too far.

And I won't divulge his name. I don't think it's appropriate. But I will tell you that it was a heartfelt letter from a man who had worked all his life to earn the right to be here -- something we take, quite frankly, for granted --

but who now faces the fact -- not the possibility but the fact -- of never ever being able to step inside a courtroom again and to argue and represent a client. And the tragedy of his loss and the recognition of his loss brought home to me again how important it is that we all make sure that we stay on the correct side of the line. You don't get points in this game for catching a pass on the outside bounds just touching the chalk. That's not the way lawyers are supposed to operate. We're supposed to be well inside those grid marks.

And, regardless of what the outcome of this Rule 11 sanctions motion is, Mr. Dubin, whether I ultimately decide that it is appropriate or inappropriate in this case to impose Rule 11 sanctions -- and, again, that decision will be made solely and only based upon the filings and the conduct surrounding those filings, without any other consideration -- I think that you need, as I have said, to take a good, hard second look. Because I welcome your participation in this court as a lawyer. I'm not unhappy to see you come in here because you are a talented man. But you need to make sure that, when you file complaints, when you argue positions, when you respond to other lawyers, you do so from a solid foundation because you're smart enough to know where that foundation lies.

I'm going to take these motions under advisement, and I will enter my order in writing, as I should do, hopefully within the next couple of weeks.

MR. DUBIN: Would Your Honor permit me a short response?

THE COURT: No, I don't think so, Mr. Dubin. I don't think there's any reason to respond. As I said, I'm not going to be ruling in this case based on anything other than the filings in the record. That's all.

MR. DUBIN: Well, I just wanted to tell Your

Honor that I concur with your message. Unfortunately, you don't really know me that well, and I really don't know you. I am proud of the way in which I get along with most of the members of the bar, who I respect, in this jurisdiction. I have seen much worse in California. In most cases in this jurisdiction I can settle a case without litigation.

I don't think my experience has been unique. There are some firms in this state for one reason or another proliferate litigation, personally attack your clients --

THE COURT: Well, Mr. Dubin --

MR. DUBIN: -- and --

THE COURT: -- it's not necessary for you to defend yourself here. Unfortunately, you're right. I will grant you that. You're not the only lawyer that I've had file matters in this court that were in my view baseless and frivolous. I think, however, what I am referring to is the manner in which you respond. I mean, if this eventually gets to the Court of Appeals one way or the other and they read the tenor of these filings, I think they will ask themselves where, quite frankly, you're coming from because it does not portray a picture of someone who is acting entirely responsibly. That's what I'm saying to you. And I'm saying that there's no need for
it.

You're not the worst case scenario that I've ever had in this court by any stretch of the imagination, believe me.

MR. DUBIN: Your Honor, I've always tried to do my best. I feel welcome in this court. I try to do my best for my clients.

THE COURT: Well, you are welcome in this court, Mr. Dubin. I've said that before.

MR. DUBIN: And I acknowledge I feel that way.

THE COURT: I'm just asking you to, you know, I mean a lot of times people will say, you know, "Ezra, you're wasting your time. You're talking to a brick wall, or you're talking to -- I hope that I'm not. I'm hoping that in this case, Mr. Dubin, you will accept what I'm saying in the spirit in which it is being offered.

Look, the simple fact of the matter is I don't think that because I'm a federal judge that I have any great special font on wisdom. When I was confirmed by the United States senate, that didn't suddenly display on me some great inner knowledge or wisdom or compassion or intelligence that I didn't already possess one way or the other. That's just, you know, I know that there are a lot of judges that have used themselves in that way. I don't.

The simple fact of the matter is, however, that I haven't been an advocate for a long time now. I've been on this bench now for ten years. Tomorrow I become the Chief Judge of this court. I've been around a long time, long enough to have been able to observe the practice of law from a unique and different perspective. I'm very fortunate to be in this position, and I recognize that. Not fortunate economically, I might add, but fortunately otherwise.

But the fact of the matter is from that perspective I get a different view of the way lawyers act and behave. And I think that that gives me a special perspective, and I am trying to impart that to you in a friendly, collegial way because you and I, along with all of the other lawyers here, Mr. Dubin, are officers of this court. And I learned from Judge Pence many, many years ago when I was a very young lawyer, just out of the military service and I came home to Hawai'i. And I sat with Judge Pence at that time -- and that's now, gosh, almost 30 years ago -- and Judge Pence told me something I've never forgotten: how very, very lucky -- and that's the word he used, "lucky" -- I was and blessed to be able to practice law and how important it was for me -- and he was talking to a group of young

lawyers, of which I was one -- to be able to come into court and to earn a living in that way. And I've never forgotten that. And I don't think any of
us ought to forget it.

And that's all I'm saying to you, Mr. Dubin. think that you just need to step back and take a good, hard look, and that's all.

MR. DUBIN: I'll take your advice and do that.

THE COURT: Court stands in recess.

(Court recessed at 10:46 A.M.)

11. Order Granting Defendants' Motions For Sanctions; Order Denying Plaintiffs' Counter Motion For Sanctions, Civil Nos. 98-00453 & 98-00475, filed December 7, 1998

ORDER GRANTING DEFENDANTS' MOTIONS FOR SANCTIONS; ORDER DENYING PLAINTIFFS' COUNTER MOTION FOR SANCTIONS

The court heard Defendants' Motions and Plaintiffs' Counter Motion on November 30, 1998. Gary Victor Dubin, Esq., and Gregg Young, Esq., appeared at the bearing on behalf of Plaintiffs; Katherine G. Leonard, Esq., appeared at the hearing on behalf of Defendant Bank of Hawaii; Ke-Ching Ning, Esq., appeared at the hearing on behalf of Defendants Carlsmith Ball and James L. Starshak; Harvey E. Henderson, Jr., Esq., appeared at the hearing on behalf of Defendant Jay M. Fidell; and Robert Fairs, Esq., appeared at the hearing for Defendant John Candon. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendants' Motions for Sanctions and DENIES Plaintiff s' Counter Motion for Sanctions.

BACKGROUND

On August 10, 1998, Defendant Bank of Hawaii ("the Bank") served its Motion for Sanctions on Plaintiff. On September 4, 1998, the Bank filed its Motion against Plaintiffs Allan and Jean Kunimoto ("Plaintiffs") and their attorneys, Gary Victor Dubin and Gregg Young, pursuant to Federal Rule of Civil Procedure 11. Shortly thereafter, the remaining Defendants in the underlying action each filed their own motion for Rule 11 sanctions. Because the Defendants' motions are substantially similar, the court treats them as one for purposes of this Order.

On November 12, 1998, Plaintiffs filed a Counter Motion for sanctions against Defendants.

DISCUSSION

Rule 11 requires a party and his or her counsel to verify that submissions to the court:

(1) [are) not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery .

Fed. R. Civ. P. 11(b).

The Ninth Circuit has interpreted Rule 11 as authorizing sanctions when a filing is frivolous, legally

unreasonable, without factual foundation, or is brought for an improper purpose. Estate of Blue v. County of Los Angeles, 120 F.3d 982 (9th Cir. 1997), cert. denied, — U.S. ___, 118 S. Ct. 1042 (1998). In defending against a motion for Rule 1]. sanctions, counsel may not simply plead good intentions and ignorance of the law. See, e.g., Security Farms v. International Brotherhood of Teamsters. Chauffeurs, Warehousemen & Helpers, 124 F.3d 999, 1016 (9th Cir. 1997) (counsel may not avoid Rule 11 sanctions by operating under guise of pure heart and empty head).

The court may impose sanctions upon the attorneys, law firms or parties that are responsible for the violation. Fed. R. Civ. P. 11(c). The court may issue sanctions against both the attorneys and the parties. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1336 (1990) ("The court's discretion includes the power to impose sanctions on the client alone, solely on the counsel, or on both."); Sure Safe Industries. Inc. V C& R Pier Mf, 152 F.R.D. (S.D. Cal. 1993) (ordering plaintiffs and plaintiffs' attorneys to pay attorneys' fees and costs to defendants after bringing a frivolous motion to compel production of documents). Defendants' Motions for Sanctions

In this case, the court finds that not only were Plaintiff s' Complaints frivolous, they were filed for the improper purpose of harassing and pressuring the Defendants to settle other pending litigation. Although the court dismissed Plaintiffs' Complaints in this case for lack of standing, the court could have granted Defendants' Motions to Dismiss on the basis of several other defects. For instance, most of Plaintiffs' claims re-allege issues which have already been adjudicated by the state court in Defendants' favor and are therefore barred by the doctrines of res judicata and collateral estoppel. Plaintiffs failed to request permission from the bankruptcy court in order to sue the Trustee. Plaintiffs failed to comply with the specific pleading requirements of Federal Rule of Civil Procedure 9(b), as applied to RICO violations. Plaintiffs also failed to

comply with Local Rule 9.1 which requires a RICO case statement.[1]

[1]Local Rule 9.2 allows dismissal of RICO claims which fail to comply with Local Rule 9.1.

Furthermore, the defect on which the court did grant Defendants' Motions to Dismiss, i.e., lack of standing, was known to the Plaintiffs in advance. Plaintiffs' Complaints were filed on June 3 and June 4, 1998. On May 15, 1998- - over two weeks prior to the filing of the Complaints- - the bankruptcy Trustee filed a Motion to Direct Debtor to Cease Prosecution of Claims and Defenses of the Estate on the basis that the claims belonged to the Trustee as part of the bankruptcy estate. Although the bankruptcy court denied the motion on procedural grounds, the judge warned Plaintiffs against acting in contravention of the Trustee's authority. Plaintiffs failed to heed this warning.

Moreover, Plaintiffs failed to recognize easily discovered controlling Ninth Circuit case law regarding the classification of personal legal claims as part of the bankruptcy estate, subject to the trustee's control. To the extent that Plaintiffs argue that "it may be the law in this-circuit, but not until the United States Supreme Court were to rule would it be the law of the United States given differing approaches in other Circuits," Plaintiffs fail to acknowledge that Ninth Circuit law governs decisions of the district courts within this Circuit absent Supreme Court authority to the contrary.

Not only did Plaintiffs lack standing, they acknowledged that the Complaints were deficient in other ways:

> [We] have been preparing a detailed opus to meet any specificity objections, but with the prospect of a global settlement finally at hand had decided to withdraw these

> complaints instead, and informed counsel of that fact before any of the sanctions motions were ripe . . . so as to further avoid any unnecessary extra work, but have been unable to secure client permission . . .

In essence, Plaintiffs had an opportunity to either (1) respond to the failures of the Complaints, or (2) withdraw the Complaints before sanctions became ripe. Plaintiffs did neither. Instead, Plaintiffs responded to Defendants' Motion for Sanctions by accusing Defendants of being "a fee-generating machine that self-servingly overcharges mercilessly (its] lender clients, bloating the fees and costs of litigation to the point that reasonable settlements are moved out of range . . . ." This, from the very same attorneys that described their successful harass-and-delay strategy as follows:

> In my opinion, what BOH [Bank of Hawaii] is most worried about is how much it will cost them in costs and fees fighting me. * * * yet the judges in federal court are frankly ignorant of the current fee and cost realities and put attorneys to impossible recordkeeping tasks to prove fees. Thus, Liberty Bank lost more than $300,000 fighting us in the foreclosure, plus vast interest for four years of foreclosure delays by me that is why I am getting settlement offers routinely in my foreclosure cases.

In opposition to Defendants' motions, Plaintiffs argue that Defendant Bank of Hawaii intentionally blocked their compliance with the twenty-one-day "safe harbor" provision of Rule 11. The "safe harbor" provision allows the party against whom the motion is made twenty-one days to withdraw or appropriately correct the pleading or motion which is the basis for sanctions before the motion may be filed with the court. Plaintiffs contend that they offered to

voluntarily withdraw the Complaints without prejudice but that Bank of Hawaii refused this offer. Plaintiffs' offer fails to satisfy Rule 11 for three reasons.

First, although at least one court has held that an offer to dismiss an action with prejudice can constitute an informal withdrawal pursuant to Rule 11, Succession Picasso v. Spedding, 1997 WL 65911; *2 (S.D.N.Y. Feb. 13, 1997), the court finds in this case that Plaintiffs' offer does not constitute any form of withdrawal. Unfortunately, Plaintiffs' actions belie their stated intentions. If Plaintiffs truly intended to dismiss the offending complaints and avoid sanctions, they could have submitted a stipulation for dismissal to Bank of Hawaii or filed a motion for voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a) (2). They could also have abandoned their claims or ceased litigating them. Instead, Plaintiffs utterly failed to correct or withdraw the frivolous complaints and, in fact, vigorously litigated their position and even sought reconsideration of the court's decision to dismiss the complaints.

Second, the court finds that Plaintiffs' offer to dismiss the complaints does not satisfy the spirit of the "safe harbor" provision. Rather than withdrawing their position or acknowledging candidly the lack of support for such a position, Plaintiffs' offer instead constituted a negotiating tactic designed to maintain leverage against the Defendants in order to achieve a settlement. Plaintiffs' counsel's letter of September 2, 1998 states that Plaintiffs would be willing to dismiss the subject complaints if Bank of Hawaii agreed to dismiss its nondischargeability complaint in the bankruptcy action. Such an offer of dismissal hardly constitutes the type of response envisioned by Rule 11.

Third, Plaintiffs' offer was made only to the Bank of Hawaii and, therefore, could not protect them from sanctions brought by the other Defendants. Although each of the other Defendants filed motions for sanctions,

Plaintiffs' counsel made no such offer to the other Defendants to dismiss the complaints.

Finally, the court notes that Plaintiffs show absolutely no signs of curtailing their harassing litigation strategy. Plaintiffs filed a meritless Motion for Reconsideration, based largely in part on arguments raised and rejected previously by the court. The Plaintiffs have also declared that they will now proceed to file a motion in Bankruptcy Court to remove the trustee and his attorney f or their failure to bring the claims asserted by Plaintiffs below and will likely "be forced to appeal" the underlying dismissals.

By ordering sanctions against Plaintiffs' counsel in this case, the court hopes to put an end to their continued misuse of the federal court system. Frivolous lawsuits filed for purposes of harassment and delay will not be tolerated.

After careful consideration, the court finds that an award of attorneys' fees is the appropriate sanction. "In a case like this, where the original complaint is the improper pleading, all attorney fees reasonably incurred in defending against the claims asserted in the complaint form the proper basis for sanctions." Gaskell V. Weir, 10 F.3d 626 (9th Cir. 1993). The district court has wide discretion in awarding attorneys' fees under Rule 11. United States v. 87 Skyline Terrace, 26 F.3d 923, 929 (9th Cir. 1994). "A restitutionary award compensating the opposing party for unnecessary litigation expenses--as opposed to a punitive fine paid to the court -- is a particularly appropriate sanction in cases involving manipulative petitions filed principally for purposes of delay and harassment." Marsch V. Marsch, 36 F.3d 825, 831 (9th Cir. 1994) (discussing the imposition of Rule 9011 sanctions).

Therefore, the court GRANTS Defendants' Motions for Sanctions and hereby designates this matter to the Magistrate Judge for calculation of the amount of reasonable attorneys' fees to be paid by Plaintiffs' attorneys,

Mr. Dubin and Mr. Young, to Defendants. Plaintiffs' Counter Motion for Sanctions Plaintiffs filed a Counter Motion seeking sanctions under Rule 11 and 28 U.S.C. § 1927 based on Defendants' filing of various motions for sanctions. For the following reasons, the court denies Plaintiffs' Counter Motion.

First, Plaintiffs failed to abide by the 21-day "safe harbor" provision of Rule 11. In fact, Plaintiffs' Counter Motion was served upon Defendants on the same day it was filed with the court. Second, an award of sanctions under 28 U.S.C. § 1927 requires a finding of recklessness or bad faith. In re Keegan Management Co., 78 F.3d 431, 436 (9th Cir. 1996). The evidence before the court does not support a finding of either bad faith or recklessness on the part of Defendants. Therefore, Plaintiffs' Counter Motion for sanctions is DENIED.

CONCLUSION

For the reasons stated above, the court GRANTS Defendants' Motions for Sanctions and DENIES Plaintiffs' Counter Motion for Sanctions.

IT IS SO ORDERED. /s/ DAVID ALAN EZRA

DATED: Honolulu, Hawaii, December 7, 1998.

12. Declaration Of Allan R. Kunimoto, M.D., Civil Nos. 98-00453 & 98-00475, filed December 21, 1998

DECLARATION OF ALLAN R KUNIMOTO

I, ALLAN R. KUNIMOTO DECLARE:

1. I am the Plaintiff in Civil No. 98-00453; I make the within statements based on my own personal firsthand knowledge.

2.I just learned of Your Honors' decision to sanction two of my attorneys, Gary Victor Dubin, Esq. and Gregg Young, Esq.

3. I would like to put on the record that even from 1994, Mr. Dubin bad made attempts with the Bank of Hawaii to settle our differences This was about the same time that Mr. Dubin was sending me his many cartoons, all of which were Privileged Documents and inadvertently given to the attorneys of the Bank of Hawaii and not returned. I did not take his cartoons seriously. I simply thought that this was his way of demonstrating that he had a sense of humor.

4. When my mainland attorney, Mr. Cappello withdrew as counsel under "rather unpleasant circumstances", my family was without counsel and heading into a trial. Gregg Young and later Gary Victor Dubin never deserted me and worked to help my family, knowing full well that my finances were strapped by the Receiver and they would not be paid.

5. Prior to the trial, there were several offers from me to settle through Mr. Cappello's assistants and Gregg Young, but those offers were unacceptable to the Bank of Hawaii.

6. Mr. Dubin and Mr. Young, unselfishly, spent three months in trial on my case without any pay and not even asking me to pay. They just wanted to help.

7. I still remember what Mr. Dubin told me on the first day that I met him. He said that most of our (legal) profession "hurt" people. The medical profession helps people. His philosophy was that he wanted to help people. He hated "injustice". I remember that day in Court before Judge Chang when Mr. Dubin fought for me and my family when the Receiver had cut off all funds from me, including not paying my employees for almost two months in violation of the Labor Laws, not paying my medical practice expenses and not giving me or my family any money for food, utilities, or transportation. I do not feel that any other

attorney would have confronted a Judge and fought for his clients as Mr. Dubin did, even if the Judge had made judgments in violation of the Federal Labor Laws. I, as well as many of my family friends, feel that the Receiver conspired with the Bank to cut me off from any funds so that I would not be able to pay for my expert witnesses or complete my depositions before the upcoming trial feigning that I was "not cooperating" This withholding of funds by the State Court appointed Receiver forced me to file bankruptcy Despite my working full time m my office, the Receiver essentially withheld all of my income, not paying my office expenses or my employees for two months (until Mr. Dubin intervened), and not giving me any personal funds for food, utilities, money for my children in school and personal funds for about six months, when he was replaced with a Trustee of the Bankruptcy Court. It was also approximately another four months (a total of some ten months without any personal, family support income) after my bankruptcy filing that even the Trustee gave me my first $2,000 to pay for food and personal expenses for me and my family. Is this the type of treatment that is condoned in this society? It seems inhumane, yet the withholding of funds was approved by the State Court Judge. Yes, this happened in Hawaii. No one can be expected to survive without money for food, etc. for ten months, while the Receiver paid himself almost $200,000 in fees. This is just one example to illustrate to you why Mr. Dubin and Mr. Young became so morally offended, thereby instilling their forever grateful ironclad loyalty.

8. I was never involved in a three month trial before. I had imagined that all evidence would be presented to the jury from both sides and the jury would then make their determinations on the case. In our State Court trial, all of our evidence damaging to the Bank were rejected by the Judge and not heard by the jury. Two examples come to mind.: First. after admission by the Bank officials that some interest on my loans were back-dated and thus excessive interest in the form of default interest was charged to me, the Bank, during the trial, offered to reverse these excessive

amounts, but only on the loans tried in the case, despite the fact that I had paid over $700,000 in excessive default interest on loans that were previously retired, which if properly applied would have completely paid off some of the complaints in the State Court trial. Because of the Bank's action, the Judge ordered that we could not present the Bank's conduct on backdated interest to the jury. The second example is when my expert banking witness was to testify against the Bank on their wrongdoing in my case. The Judge removed the jury after the expert witness had given his CV and expert qualifications and questioned the witness, asking him to go over what he was to say in front of the jury. She stated that she did not want to hear what he was going to say that was good about the Bank, but what was the wrongdoing was. She immediately essentially cut everything that my expert Banking witness had concluded of the Bank's wrongdoing in his comprehensive study of my case, so that his testimony before the jury was essentially stricken. Yet, she allowed the Bank's expert witnesses to testify adversely against me, although their testimony fell to pieces during Mr. Dubin's cross-examination based on my expert's findings of the Bank's wrongdoing, which the Court prevented the jury from hearing.. All of this bias on the part of the Judge was evident during my trial. It was my impression that Canon's rules for Judges mandated that ethical judges should disqualify themselves from a case if such a bias is clearly evident. Yet this Judge refused to answer my attorneys' discovery of a below-market interest mortgage given to her just a few months before trial by the Bank and refused to step down from this case, despite an affidavit by a CEO of another Hawaii financial institution that the Judge's loan appeared to be "a sweetheart loan". I am informed that there is a former Bank employee, who has personal knowledge that the Judge's aforesaid Bank's below market interest mortgage loan was procured by a material trial witness testifying on behalf of the Bank, which my attorneys' had asked this Court for protection to bring forward in the Federal Court actions to testify.

9 After I filed for bankruptcy, my attorney, Enver Painter, Jr., spent about five months trying to effectuate a settlement with the Bank of Hawaii and when a tentative settlement was reached, this was opposed by the Trustee It was only after these settlement talks had failed that the federal court actions were filed.

10. I am very appreciative of Judge Lloyd King's efforts to achieve to a global settlement in my case. As we were close to a global settlement, Mr. Dubin and Mr. Young not only offered to postpone any further action in the federal court complaint, but also agreed to dismiss without prejudice, but I understand that this offer was rejected and complicated by the Receiver's motion for summary judgment on the case. I am not familiar with the law, but my attorneys spoke to me about the safe harbor provisions and despite my absolute refusal to allow them to dismiss with prejudice, it was my understanding that they could satisfy the safe harbor requirements by offering to withdraw without prejudice, which both satisfied me and the safe harbor provisions.

11. I can attest to the fact the Mr. Dubin and Mr. Young have always worked toward a settlement in this case. The privileged documents that are constantly produced in these federal court hearings were written in 1994 and do not reflect the actions of Mr. Dubin or Mr. Young. We were thrown into the trial because my family and I were suffering huge injustices, both legally and morally and even when we tried to forgive the offenders through offers of settlement, they refused. Mr. Dubin and Mr. Young's role in this was an unselfish effort to help their clients and to undo an "injustice", despite any means of repayment. Their actions truly exemplify attorneys who are not trying to raise the costs or this case, especially when they are not getting paid. There are very few attorneys in this State that would do as much for their clients. It is almost routine that attorneys withdraw if they are not paid. There are few attorneys with such moral consciences that would do as much for their clients. These two attorneys should be role models for our justice system. In my profession, we do not turn away

anyone who cannot pay. Our medical profession helps people I hope that our justice system does not push those who help.

12. In conclusion, I hope that you will reconsider your motion for sanctions against Mr. Dubin and Mr. Young. The Complaint was not frivolous, nor meant to harass. It was filed to protect the rights of his clients (my family) when it seemed that settlement could not be achieved. In fact, I believe, that it was the Complaint that has brought all parties closer to settlement. To impose sanctions on two attorneys who exemplify the same standards as our medical profession for those who cannot pay would convey the wrong message for this judicial system. Please do not punish those who bring respect to your profession.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Honolulu, Hawaii, on December 17, 1998.

/s/ ALLAN R. KUNIMOTO

13. Transcript of Proceedings, December 22, 1998, Plaintiffs' Motion To Reconsider Sanctions, Civil Nos. 98-00453 & 98-00475

THE CLERK: Civil 98-00453, Allen Ryo Kunimoto vs. Jay M. Fidell, et al., and Civil 98-00475DAE, Jean Mieko Kunimoto vs. Jay M. Fidell, et al. This case has been called for hearing on plaintiffs' attorneys in their individual capacities motions for, No. 1, reconsideration and for striking of the December 7th, 1998 order granting defendants' motions for sanctions against them personally; two, for the disqualification of the Honorable David Alan Ezra; three, for the hearing of this motion by another judge; four, the setting aside of all entered orders and judgments in these consolidated actions and, five, for the hearing of these

matters en banc by the entire court, and also in supplemental support of plaintiffs' motion for reconsideration filed on December 17th, 1998.

THE COURT: All right. Let me correct the record very quickly; that is, indeed, what was filed by Mr. Dubin, but that is not why we're going to be here today. I have no intentions of hearing the substance of any of the motions that have been filed by Mr. Dubin today. The only purpose today is to determine in my own mind because I've got to make a decision whether I should have Mr. Dubin's motion that I should recuse myself from this matter heard by another judge or whether I should hear the matter myself, and I'm having some difficulty recalling some events Mr. Dubin has indicated occurred in his affidavit, and I want to clarify that before I make a determination. But, before we go any further, let's have appearances by counsel, please.

MR. HENDERSON: Harvey Henderson for Defendant Jay Fidell and with me also is Mr. Scott Batterman from Mr. Fidell's law firm.

THE COURT: All right.

MR. KLEVANSKY: Good afternoon, Your Honor. Simon Klevansky appearing on behalf of John Candon, trustee of the Kunimoto estate. Mr. Fans is on a plane and flying.

THE COURT: All right. Thank you.

MR. KAWASHIMA: Good afternoon. Jared Kawashima appearing on behalf of the Carlsmith law firm.

MS. LEONARD: Good afternoon, Your Honor. Katherine Leonard and Brent Yamashita on behalf of Bank of Hawaii.

THE COURT: All right. Thank you.

MR. DUBIN: Good afternoon. Gary Dubin appearing on my own behalf.

MR. YOUNG: Good morning -- good afternoon, Your Honor. Gregg Young for the plaintiffs.

THE COURT: All right. Good afternoon to all of you. You can be seated.

I know that -- first of all, Mr. Dubin you filed this document on the 21st. Did you mail a copy to counsel on the 21st?

MR. DUBIN: Yes, Your Honor. Copies were mailed

THE COURT: Okay.

MR. DUBIN: -- to each of the four.

THE COURT: All right. Because there were a number of copies that were left downstairs, those were different copies?

MR. DUBIN: No, those were additional copies because I was not provided with file stamped copies.

THE COURT: So -- but, my understanding is that counsel have now obtained copies by making copies from the original downstairs, is that right, when you were notified by my law clerk that there was going to be a hearing today?

MS. LEONARD: Your Honor, we have obtained copies, and I believe my office provided them to each codefendant's offices.

THE COURT: All right. So, you each do have copies. You haven't had a great deal of time to look at them, but you do have copies.

UNIDENTIFIED DEFENDANTS' ATTORNEY: I got back at 12 o'clock it was there.

UNIDENTIFIED DEFENDANTS' ATTORNEY: It appeared to be a file stamped copy rather than a copy of a file stamped copy.

THE COURT: Okay.

MR. KLEVANSKY: Your Honor, late this morning what I presume what was full set of documents was delivered on to our office. I have had a chance to review the motion memorandum, but not the exhibits.

THE COURT: Okay.

MR. KAWASHIMA: Similar, Your Honor. I just returned to my office at 1:30. So I haven't had much of a chance to review that.

THE COURT: All right. I don't want to go into the substance of Mr. Dubin's -- I don't know whether you'd call them allegations or assertions or what you would use in them. There's a plethora of them in here, but I have to make a decision, obviously, as to whether based upon his suggestion that I should recuse myself.

Now we don't -- in the federal court system we don't allow lawyers to simply come into court and ask that a judge be recused because they don't like the judge's decision. Even when the, if you will, suggestion that the judge is wrong is littered with invectives because, obviously, that would give one party to any lawsuit what you might call a unilateral opportunity to recuse members of the judiciary and that just simply isn't the way we operate in federal court, nor is it the way any court to my knowledge operates. When there is a legitimate claim of bias on behalf of the judge, it is the responsibility of that judge to investigate and to determine whether there is, in fact, a legitimate claim of

bias. Just somebody throwing out something and saying: You're biased doesn't do it.

Most of Mr. Dubin's allegations in this matter with respect to bias really go to his suggestion that the Court for some untoward reasons that he has suggested ruled the wrong way in his view. What Mr. Dubin says in his papers is very different than what he said to the Court in open court on the record, but, nonetheless, that will speak for itself.

The thing I am concerned about, though, is something I have no recollection of whatsoever. Now I haven't been in the private practice of law for about ten and a half years, that's over a decade. Clearly in my private practice like most lawyers I assume my firm had clients who didn't pay bills, and my firm on occasion had to pursue those claims, and it certainly not uncommon when lawyers pursue claims to have individuals assert that the lawyer's services in defense of the claim to have the assertion that the lawyer's services were inadequate or improper and so forth. That's a fairly common defense.

Now you make a statement in here, Mr. Dubin -- and I'm trying to -- honestly, I have no recollection of this whatsoever, and I'm trying to bring it to my mind because I have none. To my knowledge I've never personally been sued for malpractice, and -- to my recollection. Maybe it happened and I don't recollect it, but I certainly don't have any recollection of it.

You make a statement on Page 2 of your affidavit, Paragraph 6, you say -- and this is you you are speaking of:

When he was a practicing attorney, meaning me, I took over a case involving claims against him by one of his former clients he was suing for disputed fees, containing allegations of legal malpractice against him personally.

What claim was this, Mr. Dubin?

MR. DUBIN: First of all, Your Honor, again, you set the ground rules. I just want it clear that I'm here without waiving my rights to proper notice and without prejudice. All right. You are setting the ground rules again. I can call to --

THE COURT: Well, you know, Mr. Dubin, all I can tell you is that I'm the judge here,

MR. DUBIN: Well, if you want --

THE COURT: . . .and that's the name of the game. mean, I have to have a hearing. I'm trying to figure out what it is so I can determine whether --

MR. DUBIN: And I'll be --

THE COURT: -- I should send this to another --

MR. DUBIN: And I'll be happy to answer your questions, but --

THE COURT: All right.

MR. DUBIN: -- you've characterized incorrectly my disqualification motion, but that being as -- that being --

THE COURT: Okay.

MR. DUBIN: -- whatever it is, I'll answer your question.

Your former client's name was Jacob Tzur, T-Z-U-R. His company's name was Samuel -- excuse me -- Sandwich Isles Construction, as I recall it. This was in approximately 19 maybe -- I forget when you took the bench -- in 1984-'85. You had sued him for fees, my recollection is something in the neighborhood of maybe ten, fifteen thousand dollars, he had a lawyer, I took over some of his litigation, he brought me into the case. Mr. Nagle of your firm, as I recall at the time, was principally -- brought the

action he felt that you had committed malpractice. As you say, it's a common thing that --

THE COURT: Did he -- was there a counterclaim in the case against me for malpractice?

MR. DUBIN: No, we hadn't filed it. First of all -and myself --

THE COURT: Oh.

MR. DUBIN: -- I've never filed an action for legal malpractice against an attorney for a number of reasons, but I try to work it out. So, he wanted me to file the counterclaim, I discussed it. First of all, I discussed it with you one time for about seven minutes or so by the elevators in your place where you gave me your side of the story, and, eventually, it was resolved with Mr. Nagle. I think he paid your firm, as I recall, in settlement something like $5,000, and the case was dismissed; that was the only time that I had ever had any meeting with you prior to your becoming a member of this Court's bench.

Those were the details.

THE COURT: Okay. So, I do remember Mr. Tzur. I won't get into the substance of Mr. Tzur's problems, if any. I do not recall ever talking to you for seven minutes by the elevator ten and a half years ago, and, as you have now acknowledged, there was never any malpractice claim filed against me. So, let's make that clear.

MR. DUBIN: Well, my declaration doesn't say that.

THE COURT: Well --

MR. DUBIN: I remember talking to you in the elevator as much as I can see the pen in front of my hand at this time.

THE COURT: Okay.

MR. DUBIN: But --

THE COURT: I didn't say that. I said: I have no recollection of talking to you for -- as you characterize it, for seven minutes in front of an elevator a decade ago in which there was no allegation ever made against me of malpractice.

MR. DUBIN: I think I made it clear --

THE COURT: So, the point here, Mr. Dubin --

MR. DUBIN: The purpose --

THE COURT: The point here, Mr. Dubin --

(The Court and Mr. Dubin speaking simultaneously)

MR. DUBIN: . . .Paragraph 6. Well, let me say: I subsequently had learned to have great doubts concerning Mr. Tzur's credibility, and there was no intention to suggest that you had in any way committed malpractice. From my experience with Mr. Tzur, I highly doubt that, and that wasn't the purpose of Paragraph 6. The purpose of Paragraph 6 is stated in Paragraph 6, and I feel these questions are a distraction from the concerns that I have.

THE COURT: Well, I will let your characterization of Mr. Tzur and your view of his credibility be the final word on that here. I will say this: As I told you I cannot recollect anyone ever filing a malpractice case against me and I take it that you know the reason I was having some difficulty here is it says: I took over a case involving claims against me. There was never a claim against me in the case to my knowledge.

MR. DUBIN: Well, he had claims.

THE COURT: Well, he didn't file them.

MR. DUBIN: Well, I think that was because of me that he didn't file them.

THE COURT: Oh, okay. But, it says here: I took over a case involving claims against him, which sounds to me like the case has in it claims against me. Maybe that was just a way you just kind of misspoke yourself --

MR. DUBIN: Well, you were very upset with his claims when I talked to you.

THE COURT: I was?

MR. DUBIN: You were very upset, and, believe me, I've had enough experience with him that I can understand why you would be very upset.

THE COURT: Okay. Well, I don't remember that, but I will let it lay as it is.

I can assure you, Mr. Dubin, that my ruling had absolutely nothing to do with your representing Mr. Tzur, a fact of which I did not recollect and still don't recollect, except I'll take your word for it, even as we sit here today. Nor do I remember you representing him or talking to me about him or his claim, such as it was, by any elevator for seven minutes a decade ago. I'm not saying it didn't happen. I am telling you: I do not remember it as I sit here today, and I can assure you because I don't remember it as I sit here today, I couldn't have taken it into consideration in issuing my ruling on the sanctions.

MR. DUBIN: Well --

THE COURT: The fact of the matter is, in any event --

MR. DUBIN: You know, again, I say -- you know - this seems to be a forum for you. The point is:

Subconsciously, I don't know what you may have taken into account. I tried to give a complete statement.

THE COURT: Well, I can tell you what I took into account --

MR. DUBIN: But, I'm trying to clarify the record:

There was no suggestion here you ever committed malpractice. I hold Mr. Tzur in very low regard, and I only remember the incident because you were very upset, and, as I said, I could understand why you would be upset.

THE COURT: All right.

MR. DUBIN: I think the man really didn't know what the truth was. How can I say it any further.

THE COURT: Okay. All right. Well, we've cleared that up, I guess.

I have a great deal of respect for the facts, and I believe -- and I'll have to let my ruling until either I or some other judge has an opportunity to look at the substance, which I haven't really had a chance to do. I only looked at your affidavit, really, and glanced briefly at the substance of your motion.

I based it, as I sit here today, upon my understanding carefully from reviewing the record of the facts. Now, obviously, I understood when I issued the order that you would disagree with that -- and Mr. Young for that matter. Let me say this: The fact that you may have represented somebody in a case in which I was adverse as a lawyer is absolutely inconsequential to me. I have lawyers appearing before me daily who were on the opposite sides of some very difficult, long, complex and heated cases, and that happens on a very regular basis. And, you know, my reputation for being fair or if, as you suggest, I think, in these papers, which you believe is a reputation for being

less than fair, will have to stand as it is. There's nothing that I can do or even should do to try to defend myself. That's not why I'm here. I'm here to do the right thing. What I think is the right thing under the law and otherwise, and I've been very fortunate because we've had some wonderful teachers in this court over the years. People whose integrity is absolutely impeccable.

Now, because you have made a claim of bias, Mr. Dubin, I want to be absolutely fair to you and to Mr. Young. I gather, Mr. Young, you join in that claim?

MR. YOUNG: I haven't read it -- had the opportunity to go through it, but I guess for purposes –

THE COURT: Oh, you haven't had a chance to review what Mr. Dubin submitted?

MR. YOUNG: I just got -- I just received it today also.

THE COURT: Well, you don't want to join -- do you want to join in what he's saying without having had a chance to read it?

MR. YOUNG: No, not -- let me read it first and then I'll --

THE COURT: All right. Well -- all right.

MR. DUBIN: Again, Your Honor, you have got the stage. That's the wrong issue. The question is whether he feels that you have exercised --

THE COURT: No. No, it isn't the wrong issue because the sanctions were issued, there has been a motion for reconsideration filed, there's allegations of bias. It's replete with suggestions of misconduct, I guess you might say, on my part, one way or the other, and I am just trying to clarify for Mr. Young's benefit whether he

participated in the filing. He's indicated to me today that he did not; that may become important later for him, Mr. Dubin.

MR. DUBIN: Your Honor, you have asked him the wrong question because this is my declaration and not him. The question you might want to ask him is whether he feels that you have been biased and prejudiced in the manner in which --

THE COURT: I thought that's just what I just asked him. But, I'm not here to do that. I'm not --

MR. DUBIN: He hasn't --

THE COURT: You know, I asked him whether he joined in the filing and he said: He hasn't had a chance to --

MR. DUBIN: He hasn't answered that question -- he hasn't yet answered that question.

THE COURT: Do you join in the filing, Mr. Young, personally?

MR. DUBIN: That's not the question, Your Honor.

THE COURT: That's the question I'm asking him - whether he's --

MR. DUBIN: I filed.

MR. YOUNG: May I reserve that, Your Honor, until I –

THE COURT: Let's clear up. You haven't had a

chance to review it, so you can't tell me whether you join in it or not. That's a fair enough position. Is that what you are saying?

MR. YOUNG: Yes, Your Honor.

THE COURT: Okay. Simple. Now, to be fair, Mr. Dubin and Mr. Young, because there are allegations of bias -bias, which I absolutely do not have against you in my own view, never have.

MR. DUBIN: Can I read your own words back to Your Honor in the transcript that I just got, which is one sentence that all I need myself to conclude that?

THE COURT: Okay.

MR. DUBIN: It's on page -- now you know the situation I've had with Judge Real. Now maybe you are not aware of his reputation, maybe that's not important, but I have suffered a great deal in the last couple of years. You may think because of myself -- you may think trying somebody without allowing them to have their files, for example, is fair.

THE COURT: Well, I --

MR. DUBIN: I know: You don't want to get into it, but --

THE COURT: I don't. I mean, I thought, Mr. Dubin, that you had an appeal. What happened to your appeal?

MR. DUBIN: You have -- I'll cover that in a second, but --

THE COURT: Well, no. No, we don't want to cover

it. I mean, I think --

MR. DUBIN: Well, you have made a statement and I'd like to read it to you. It's at the bottom of Page 26, Line 25, onto the next page. Now you portray yourself as a victim. That's you referring to me.

THE COURT: Right.

MR. DUBIN: You are always the victim, Mr. Dubin. Unfortunately, you are not a victim unless you are a victim of your own actions.

THE COURT: Okay.

MR. DUBIN: That is correct. Well, you believe that, so then -- then you face the issues here presented by mainly principally the attorney for the Bank of Hawaii.

THE COURT: I'm sorry?

MR. DUBIN: You present -- you have to decide to what extent Ms. Leonard is accurately telling you what actually happened, and all of these factual conclusions you have made. But, you know beforehand, of course, that I always make myself out to be the victim. So, believing that, I can see how you came up with your sanctions order (indicating) --

THE COURT: Well, your --

MR. DUBIN: -- because, after all, I'm always pretending to be the victim. Well, that's the bias and prejudice, not about Jacob Tzur. That's the bias and prejudice.

THE COURT: Oh. Well, I don't know why you put Jacob Tzur in there, but that's -- I guess you just kind of threw him in for added spice, is that --

MR. DUBIN: Well, I just tried to be as thorough as I could because -- because I never let it bother -- I never let it bother me, but I never know if it bothered somebody else consciously or subconsciously.

THE COURT: Okay.

MR. DUBIN: But, that's not the issue. The issue is just what I read to you.

THE COURT: Well, my comments were not --

MR. DUBIN: I'm always the victim. You believe I always style myself as the victim, that sounds terrible -that sounds terrible. When I judge a person like that, I figure he's always complaining. He always styles himself as the victim. I'd make certain prejudgments about him, wouldn't I? Well, that's what you have done, as evidenced by what? As evidenced by -- well, I try my best. I don't get paid by the Bank of Hawaii.

I came back here with two hundred and sixty-three dollars in my pocket, everything I had was stolen from me trying to build up my law practice, and I spent -- I spent a third of my time in the last two years fighting the Bank of Hawaii without paying -- without payment of my costs.

THE COURT: Well, you just -- you know -- in arguing to me right now you're portraying yourself as a victim.

MR. DUBIN: Well --

THE COURT: You just did it.
MR. DUBIN: Well, I'm --

The facts are the facts. That's why I gave you --

THE COURT: You just did it again, Mr. Dubin. This is what I'm telling you.

MR. DUBIN: That's what you think.

THE COURT: Well, I mean, I'm sitting here listening to it.

MR. DUBIN: That's your view, and I think it's clear in the transcript what you intend that to mean by. I'm just somebody who is struggling to make -- to get the facts

looked at. In my case I never had the facts looked. In Dr. Kunimoto's case he has yet to have the facts looked at.

THE COURT: Okay.

MR. DUBIN: Now I don't want the Court to think that I'm a -- you know -- that I'm a Don Quixote -- you know -I'm here to save the world. I'm sorry I ever got involved in these cases. I just got sucked into it. It couldn't afford to get involved like I did. I got -- I got sucked into it. So, finally, we will have a trial. I have no idea what would happen -- what would happen at the trial, but I'm trained to -- you know -- believe that justice is important, and I tried to do my best with a motivation not to harass or intimidate anybody, and it's a joke that I could harass or intimidate lawyers that have got $7 million to spend.

THE COURT: Are you done?

MR. DUBIN: I stand on what -- the papers that I presented.

THE COURT: Okay.

MR. DUBIN: I'm just here because you said you wanted some clarification.

THE COURT: All right. No, I wanted clarification of that one -- that one paragraph because, obviously, had there been some malpractice claim filed against me that I was unaware of and you had prosecuted that claim, I think that it would be incumbent of me immediately to recuse myself, Mr. Dubin. But, since we now know that that never happened, that -- and since I have no personal bias or prejudice against you even today, my comments with respect to -- the ones that you have just pointed to with respect to my concern that you portrayed yourself as a victim had to do with the way you portrayed yourself in this case in the filings that accompanied your memorandum in opposition to these various motions.

Instead of simply sticking with the facts and the issues --

MR. DUBIN: Well, Your Honor --

THE COURT: -- you spent a great deal of time - pages and pages and pages -- talking about how --

MR. DUBIN: Your Honor --

THE COURT: No, Mr. Dubin, I am talking now, so you will be seated, please.

MR. DUBIN: (Complying).

THE COURT: I had to go through pages and pages in order to try to find the substance of which you were arguing about how the Bank of Hawaii's lawyers and everybody's lawyers were all after you, and conspiring against you in one way or another; that was where I was coming from, Mr. Dubin, but it really had nothing to do with whether or not your claim had substance, which is what I look at when I determine whether or not somebody has -- has made a case for summary judgment or a motion to dismiss or not made it, and/or whether Rule 11 sanctions are appropriate, something that I rarely give. Rarely give, Mr. Dubin.

MR. DUBIN: Yes, Your Honor.

THE COURT: Now let me say --

MR. DUBIN: Well -- I can't answer --

THE COURT: No, you can't because there isn't really anything to answer.

MR. DUBIN: Well, yes, there is, Your Honor.

THE COURT: Oh, Mr. Dubin, please --

MR. DUBIN: They are the ones -- I was responding to what they did, Your Honor -- to what they sent. You forget that they're the ones Ms. Leonard is the one -- you can read her papers -- that hurled all these accusations.

THE COURT: Okay.

MR. DUBIN: I was trying to defend myself, but you forget what started it in the papers. It's all in the record. You forget what they said. I was just responding.

THE COURT: Mr. Dubin, I am sure that at the proper time counsel on the other side of the table will have an opportunity to address the many allegations you have made today and otherwise, and I'm sure that their silence today is not meant as their acquiescence in the statements you have made or the way you have characterized their conduct or my conduct or your conduct.

MR. DUBIN: Thank you. But, I am not talking about their silence. I'm talking about your silence.

THE COURT: My silence?

MR. DUBIN: Your silence as to all of their accusations.

THE COURT: Oh.

MR. DUBIN: That's what I'm talking about. You only see it one way.

THE COURT: Okay.

MR. DUBIN: That's the point. And you are the one that brought this up, and I'm just responding to what you said that I have --

THE COURT: Ms. Leonard?

MR. DUBIN: . . .portrayed myself as a victim.

MS. LEONARD: Your Honor, if I may, I'd like to address limited remarks to the issue of whether or not this Court should disqualify itself.

THE COURT: Well, we're not going to get that far because I don't think that given the situation Mr. -- I'm not going to remove myself at this point because I really don't have any bias or prejudice against Mr. Dubin. Never did and still don't. This isn't the first case Mr. Dubin has been in front of me in.

I believe that on the record at the last hearing Mr. Dubin said that I treated him fairly. Now that's very different than what I got in the papers, so I'm trying to reconcile those two, but I'll let somebody else reconcile because I'm not going to rule on it.

MR. DUBIN: Well, if you don't want me to explain that, I won't.

THE COURT: No, no. You can explain it to Judge Pence because I am going to assign your motion for disqualification of me to another judge, and Senior United States District Judge Martin Pence will hear that motion - hear that request, as should be -- impartially and fairly.

Judge Pence is a man of absolute unquestioned integrity and honor and distinction. If he believes that there is an appearance of impropriety in my continuing on in this matter, regardless of whether he thinks I did anything wrong, he will grant your request, and I will step aside. I have no personal stake in this case. I have lots of cases here to handle, and I'm also helping in other districts. I'm not trying to hold onto this case in a sense that I have some personal stake in the outcome of this case. I have none.

But, I also don't recuse myself frivolously or without good reason because that is unjustified and improper and would be a derogation of my responsibilities and duties, and just because somebody says: Judge, I want you to recuse yourself because you are biased against me, I don't step aside, unless in fact I feel a sense of bias. I go over the top to try to be fair. In fact, I had a hearing yesterday in which I had done a considerable amount of work to prepare for it. The hearing involved a bunch of companies that were being sued by another company over some toxic waste and in going down the list I saw that a company which is a closely held corporation was a defendant, and it came to my mind that there was a woman who grew up here in Hawaii, who I know, who is a good friend of mine, is a shareholder in that company of substantial nature. Not like somebody might own a few shares of General Motors' stock. This is a very closely held company. And even though technically I was not and am not required to recuse myself under those circumstances, I brought it to the attorneys' attention and stepped aside in the case and that means that all of the work that I did -- and I did a considerable amount of work - kind of went down the tubes. But, I felt that was the appropriate and proper thing to do because above everything else, Mr. Dubin, the most important thing isn't David Ezra. It isn't my continuing on or not continuing on in this case. The most important thing is the maintenance of the appearance that this is an honorable court that does the right thing, based upon the law and the facts; that doesn't shirk its duty, but, then again, doesn't hang in there and handle cases that should not be handled.

Now if I felt one iota of personal bias or prejudice against you that I felt was in any way going to taint my ruling, Mr. Dubin, I would step out of this case so fast it would make your head spin -- believe me -- but I don't. So, I personally have no reason to step out of this case in my own view, but I will tell you that may not be the view of an impartial third party, and I want to give you -because you are entitled it -- an absolute full and ample opportunity to argue to that third party and to make your case and to let

opposing counsel make their case and let that third party make an independent unbiased judgment as to whether I should recuse myself from the case, and I can think of no one better to do it than Judge Pence.

MR. DUBIN: Isn't Judge Pence -- isn't he substantially retired now?

THE COURT: Judge Pence is able to -- like all senior judges, he's -- that's a technical subset of retirement, but Judge Pence retains his powers and authority under the Constitution of the United States. He can handle this matter.

MR. DUBIN: That's not the issue I raised.

THE COURT: Well, that's -- I'm not -- I'm not privy --

MR. DUBIN: Is it appropriate for you to pick the judge to handle this case? Is that appropriate? I raise that question and on the issue of appearance --

THE COURT: Well, I'm the chief judge here. I have to assign things. I'm not going to handle it. Judge Pence isn't going to -- I mean -- I've got to assign it to somebody. Who is going to handle it? Should I let you pick the judge? Is that what you are suggesting?

MR. DUBIN: I wonder about the propriety -- I know there has been some cases on this -- of having the person who is presented with a disqualification declaration picking the judge.

THE COURT: Would you like me to ask Judge Alan Kay to pick the judge? He may pick Judge Pence. I don't know. We don't have that many judges around here. This is not Los Angeles.

MR. DUBIN: No, I would feel -- I didn't say it was.

You know, you continue to make the record. Not much chance of me to speak, but, yes. The appearance of

propriety would be better -- as I understand the case law, the preferred approach is that somebody else picks the judge -

THE COURT: All right.

MR. DUBIN: I'm not saying anything about - negative about Judge Pence because I don't think there has been a finer judge on this bench. I've always had good relations with Judge Pence, but he is not in active service. This is a complex case. I know he doesn't come in often, and, frankly -- nothing to do with Judge Pence I would feel better having an active member of this bench look at these materials because it is relevant. The rulings in this case are relevant to my arguments, and as far as the appearance of propriety is concerned, you don't want to ask Bijan Atabaki in his case before you what he thought of the appearance of impropriety in a case that I took over substantially after you had recused yourself, after you had issued rulings in the case, and with your disqualification your recusal order in that case on your own saying that:

Well, your life -- somebody you had known as a lifetime friend had just been in the case -- that was actually untrue. He'd been in the case for three years. All I'm pointing out --

THE COURT: Well, first of all --

MR. DUBIN: Mr. Atabaki doesn't feel that the appearance of impropriety --

THE COURT: Well, Mr. Atabaki has his own problems. Let me say that that -- if you are going to characterize something about that case, let's characterize it correctly, Mr. Dubin. I didn't say whether you are talking about Mr. Gold, who --

MR. DUBIN: Correct.

THE COURT: I said, and all the attorneys involved acknowledged that Mr. Gold's appearance in the case was only made known to me very recently before I recused myself from the matter.

MR. DUBIN: I'm just telling

THE COURT: So, let's be -- let's make sure that we have a record clear so we don't pepper the record with inaccuracies --

MR. DUBIN: I am not getting into the substance --

THE COURT: And whether Mr. Atabaki, who was the recipient of some favorable rulings and some unfavorable rulings from me, was happy with me or not is of absolutely no moment to me. I make the rulings I believe are justified under the law, Mr. Dubin. I don't make them in order to
curry favor with people.

MR. DUBIN: It's the appearance of impropriety.

THE COURT: Oh. So, anytime you rule against somebody there's an appearance of impropriety?

MR. DUBIN: No. When a judge finally says: Oh, by the way, here's my last summary judgment ruling, I just realized somebody in the case was a lifelong friend. I didn't know before, so good-bye; that doesn't sit well with the people that have lost on the rulings.

THE COURT: Oh. Well, of course, I didn't know at the time that I issued the rulings, so it wouldn't make any difference at that point, would it?

MR. DUBIN: Well, I guess that's another issue.

THE COURT: No, you can raise that. That's another issue you can make on appeal.

MR. DUBIN: Well, he has been after me to raise that in that case for months.

THE COURT: Okay. Well, why don't you?

MR. DUBIN: I'm pointing out that the appearance of impropriety is very important. It is very important.

THE COURT: Okay. Then I --

MR. DUBIN: In that case -- in that case the issue lost. Whether it's -- whoever's fault it is, so we can't always please everybody.

THE COURT: All right.

MR. DUBIN: I'm talking -- I'm talking about real things like --

THE COURT: Mr. Klevansky.

MR. KLEVANSKY: Your Honor, I just rise to ask that the remarks suggesting that Judge Pence has any incapacity reviewing this case should be stricken. I think there's no basis for it.

THE COURT: Of course there's no basis for it.

MR. KLEVANSKY: And I ask that --

THE COURT: Judge Pence is as sharp today as he was 50 years ago.

MR. KLEVANSKY: Beyond that, Your Honor, I'd defer to the Court to --

THE COURT: But, that's -- that's -- you know -- I mean Mr. Dubin can make whatever statements he wants.

Doesn't mean that those statements are accurate or inaccurate. Whatever he says, he says.

I will do what you suggest. I'm not going to give you a veto power here, Mr. Dubin, over which judges handle your cases. We don't give that --

MR. DUBIN: I don't want one, Your Honor. I didn't ask for --

THE COURT: Well, you -- in a sense you do, but in any event, I'm going to ask Judge Kay, who is our immediate past chief judge and the senior active judge in regular service, to make an assignment. Now all of our active district judges are -- carry very big caseloads and are very busy. Judge King spends a great deal of time outside the district. Indeed, I think he's outside the district even as we speak. I may be wrong, but I'm not -- he may be. I haven't seen him for awhile, but he may be here. . - .and that is why we regularly ask Judge Pence to hear these kinds of matters because Judge Pence doesn't do a great deal of out of district travel, because he isn't carrying a large active caseload, like all of the other judges -- and heaven knows he did for more years than some of the people in this courtroom have been alive, and certainly is entitled to his retirement. He does handle bankruptcy matters on a regular basis, and he does hear motions to disqualify and other kinds of special proceedings.

And, actually, Mr. Dubin, because of the fact that he doesn't have a large active calendar, he actually can devote greater time and attention to the matter than probably any active judge in this district, so the opposite is actually true from what you suggest. You suggest that because he's a senior judge that somehow he has less inclination and less time because he doesn't come in as often. The fact of the matter is: He probably has more time and, certainly, has the intellect and ability.

So, I would not be surprised -- and I'll be honest

with you -- I would not be surprised if Judge Kay doesn't ask Judge Pence to handle it because that's the person we normally ask. There isn't any sinister about it. Indeed, there was something that I read in here, Mr. Dubin, and I can only attribute it to, I'm sure, a lapse of information on your part. You made some suggestion -- were you trying to make a suggestion here in your papers that I somehow played a role in getting your criminal case assigned to Judge Real? Did you make that situation suggestion in here?

MR. DUBIN: Maybe Your Honor would open up the records of this Court so I could find out how Judge Real got my case.

THE COURT: Well, whose case was it before it was Judge Real's?

MR. DUBIN: The government and I had --

THE COURT: No, no. Just answer that question.

MR. DUBIN: -- agreed to accept Magistrate --

THE COURT: Yeah, but before that which district judge was it assigned to?

MR. DUBIN: There was never an assignment to a district judge.

THE COURT: No, no. Whenever a criminal case is filed, there's always an immediate assignment to a district judge.

MR. DUBIN: It was never made known to us. At the
arraignment we signed papers and I accepted Magistrate Kurren.

THE COURT: I see.

MR. DUBIN: And I was never told that.

THE COURT: Okay. Well, I can tell you that I was not the chief judge in this district and I didn't assign your case to Judge Real. The chief judge in this district was Judge Kay.

MR. DUBIN: I had --

THE COURT: I don't assign cases.

MR. DUBIN: I had a trial come up with the other side -- plaintiffs who were represented by the Goodsill -by the -- by Bruce Lehman.

THE COURT: Uh-huh.

MR. DUBIN: The Goodsill firm, and that what was set to go to trial with you a week before my trial,

THE COURT: Uh-huh.

MR. DUBIN: . . . and that was transferred to Judge Real.

THE COURT: Well, that was my case naturally.

MR. DUBIN: That was transferred to Judge Real that was the Gilman case. I forget --

THE COURT: Okay. But, that's not what you wrote. You are talking about -- that case I was involved in.

MR. DUBIN: No, that case was assigned -- that case was assigned to Judge Real.

THE COURT: But, was that my case originally?

MR. DUBIN: That was your case.

THE COURT: Okay. So, it may well have been that I had something to do with that because I was --

MR. DUBIN: All right. So, you had something -you may have something to do with that and then that case was assigned. When the Goodsill firm --

THE COURT: But, not the criminal case.

MR. DUBIN: Well, I didn't know about Judge Real. The Goodsill firm saw Judge Real and they settled in about five hours because they know his reputation, and they didn't want anything to do with him; that case was settled. Then that cleared that one out. Then the next I knew Judge Real popped into my case.

Now, I have a lot of information on this. I don't know if it's inappropriate to take the time up, but I can tell you that I was informed by the person who ran the office of the judge that handled my case in the Ninth Circuit that they had received bad press on me from the judges here, and this is a very interesting story. If you can imagine, I'm sitting -- I'm sitting in a prison waiting for the court of appeals to free me with extreme confidence you can't try somebody without their files in the United States of America, and then I get contacted by the person who runs Judge Cecil Poole's office saying: Mr. Dubin, he's senile. He's seems to feel like he's gotten some bad press on you. You ought to complain. I've seen Chief Judge Wallace. I had lunch with him. They said: Yes, he knows, and unless he retired by the end of the year, takes senior status, they're going to have to take proceedings against him; that was really marvelous for somebody like me. Of course, I'm one of these -- I'm one of these straight arrow people who believes in justice and apple pie. I said to myself: That just seems like a crazy story. Of course, after I got Judge Poole's opinion, the facts and the law of which you wouldn't even know was my case just the day after Christmas, of course, then he takes senior status.

THE COURT: No, I -- I'm going to stop for just a minute because, you know, Judge Poole is dead.

THE COURT: He was a distinguished black jurist with a long and articulate history --

MR. DUBIN: Absolutely.

THE COURT: -- of -- and you have said some things here about him, Mr. Dubin, which are quite offensive, and I'm sorry that you said them. I will tell you that I have the highest regard for the Ninth Circuit Court of Appeals. There were three judges on any panel that heard your case, not just Judge Poole.

MR. DUBIN: You know, how that works, Your Honor.

THE COURT: No, I -- yes, I do now how it works. I can assure you --

MR. DUBIN: You know how that works.

THE COURT: Well, there were three judges on that panel. Judge Poole does not issue a decision by himself. If the other two judges didn't agree with that decision, it wouldn't have been issued. I sit myself on the court of appeals by designation. I can tell you that these are men and women of principle. They don't sacrifice their principle for comity's sake. There are many dissents. You see many virulent dissents in the Ninth Circuit. You see en banc hearings where panels are overturned, and you see it often.

Now you want to attack me, I'm here, I'm around, but don't attack a dead man who can't respond.

MR. DUBIN: The circumstances regarding Cecil Poole are well known to members, for example, of the California bar.

THE COURT: Okay.

MR. DUBIN: So, therefore, all I can say is:

These are very interesting stories, but it doesn't exactly happen like the textbook would describe.

THE COURT: All right.

MR. DUBIN: It doesn't exactly happen like the textbook.

THE COURT: Here's the bottom line, Mr. Dubin: I will ask Judge Kay to make an assignment of this bias matter to another judge. He will decide who to send it to.

Now, I'm only telling you that it is our regular practice -- all judges -- including Judge Kay, to send these matters to Judge Pence. So, if it goes to Judge Pence, it is not some sort of conspiracy between me and Judge Kay to re-funnel it to Judge Pence.

MR. DUBIN: And you think I would think that, is that correct?

THE COURT: Well, I don't know. I'm just saying --

MR. DUBIN: Well, I always style myself as a victim, don't I, so you would think that I think that.

THE COURT: I don't know that, Mr. Dubin.

MR. DUBIN: I hold Judge Kay in very high regard.

THE COURT: I'm glad.

MR. DUBIN: I don't feel he would be a conspirator.

THE COURT: Well, so do I, and I don't think so either. So, that's very good.

MS. LEONARD: Your Honor, I have a point of clarification.

THE COURT: Sure.

MS. LEONARD: Your Honor, in addition to the issue of disqualification, there are a number of issues raised in this motion, and there's actually two motions for reconsideration which have been filed.

THE COURT: Well, the first thing we have to deal with is the disqualification issue.

MS. LEONARD: I'm --

THE COURT: I've already said --

MS. LEONARD: Will the other issues be held in abeyance?

THE COURT: Yes. Everything is held in abeyance. The only thing Judge -- Judge Pence is not taking over this entire case. The only thing Judge Pence will hear, if he hears it or whatever other -- maybe Judge Mollway will get

it. I don't know. Maybe Judge Kay will give it to Judge Mollway. I don't have any idea. But, whoever hears it -or Judge Gillmor or Judge King -- whoever hears it, they're only going to hear the request to have me disqualified based upon allegations of bias. That's it.

MS. LEONARD: Okay, Your Honor.

THE COURT: And then if that's granted -- if the view is that I should step out because there is an appearance of impropriety in my continuing, under those circumstances then the new judge will have to handle the motion for reconsideration. If not, I will do it because I have already indicated I do feel absolutely no personal bias against Mr. Dubin. Never have.

MS. LEONARD: I understand, Your Honor. I guess my confusion is: We have various deadlines at this point to -

THE COURT: Well, everything, obviously, is going to be in abeyance pending --

MS. LEONARD: Okay. So, we don't need at this point in time to respond to anything other than the disqualification.

THE COURT: No, I'm going to vacate any deadlines, and once the motion to have me recused is decided, then I will institute new deadlines for these motions or whoever is going to be handling this will have to do it.

MS. LEONARD: Will that be set for a hearing and are --

THE COURT: No.

MS. LEONARD: Okay. So, we should respond as a nonhearing motion?

THE COURT: What will be set for a hearing the next time you will come to court in front of me, if I'm going to be handling it or in front of another judge, if I'm recused, will be for -- on the substantive matters -- will be to hear the substantive matters. The very next time you come to court, if there is a hearing, will be on the bias issue and that will either be a hearing or it could be done on the papers, if the judge feels that the papers adequately present the issues and no hearing is required, and that's
the option of that judge.

MS. LEONARD: Okay. And so our response at this point in time in writing should be limited to the issues of disqualification?

THE COURT: That's correct

MS. LEONARD: And as if -- and our deadlines for response are as if the disqualification issue is a nonhearing motion, unless we hear otherwise from --

THE COURT: I would think that's -- I think that's the smart way to get it in as quickly as possible, yes.

MS. LEONARD: I understand. It's a little confusing.

THE COURT: No. And because I have no idea whoever -- whichever judge is going to handle this, I have no idea whether they are going to have oral argument or they're not. I don't know whether they're going to feel it's required under the rules or not. You'd best -- if you feel like that's what you want to do, respond completely and thoroughly -- I mean -- you may agree with Mr. Dubin and feel that the record should be such that I step out.

MS. LEONARD: For the record, Your Honor, we do not agree with Mr. Dubin and --

THE COURT: Well --

MS. LEONARD: -- I've heeded the Court in not getting into the substance of this or even whether I believe that another court needs to hear this because I understand -
THE COURT: Well, I -- look, I like to keep things

absolutely abovebcard, and I think the best way to do that is to have the bias part of this heard by another judge. And, really, the only purpose of this was to try to clarify this issue of this malpractice thing because, quite frankly, if there had been that kind of a situation, we don't need to talk about bias because I would have immediately recused myself out of the entire case.

MS. LEONARD: I understand, Your Honor.

THE COURT: And so the bias issue would have been totally -- you know -- superfluous and moot, but since

we now know that that isn't the case, we need to address the bias portion of it. Okay.

MS. LEONARD: Thank you, Your Honor.

THE COURT: So Mr. Sakai is on vacation, obviously, as you can see, but you will be hearing from -you will get a written order, I guess, signed by Judge Kay reassigning this bias thing -- motion to another judge, and that should happen shortly. Okay.

MR. HENDERSON: I have another question.

THE COURT: Yes, Mr. Henderson.

MR. HENDERSON: There are five motions in here. The first is for -- well, there are two substantive motions, No. 1 and No. 4. The other three -- Nos. 2, 3 and 5 are
they all the ones that are going to be determined by the other judge? That one is for disqualification, that's No. 2 No. 2, disqualification, three is for the hearing of this motion by another judge, and that means the substantive motion -- that's the same thing.

THE COURT: Yeah. That's part of the bias thing. I think it's --

MR. HENDERSON: No. 5 is for a hearing en banc, which is really the same thing, too, if that's what Judge Kay should decide.

THE COURT: Yeah, that's right.

I think that whichever judge handles this, it's all part and parcel -- it's all precisely the same.

MR. HENDERSON: So --

THE COURT: It's all essentially the same thing.

MR. HENDERSON: And so it's 2 , 3 and 5 that we've been talking about.

THE COURT: Okay. Right. Right. Anything else?

(No response)

THE COURT: Anything else, Mr. Dubin?

MR. DUBIN: I think we're also talking about four.

THE COURT: What is four?

MR. HENDERSON: That's for setting aside of all entered orders and judgments --

THE COURT: No, no. That's the motion for consideration.

MR. DUBIN: Well, my position is the disqualified jurist -- that they're --

THE COURT: Well --

MR. DUBIN: -- orders and judgments can be set aside.

THE COURT: Well, that would be something you would -- if I am, in fact, disqualified by this other judge -if the idea is that I should step out of here, then you can raise that with them.

MR. DUBIN: I was just trying to clarify. I agree with you, but I just wanted to clarify.

THE COURT: Otherwise, I would treat it as part of the motion for reconsideration and that is not something that would be before Judge Pence or Judge King or Judge Kay, and maybe even Judge Kay will decide to keep it himself and do it himself. I would doubt that because he's got a

pretty busy calendar or Judge Mollway or Judge Gillmor whoever handles it.

All right. We'll stand in recess. Thank you very much.

(Whereupon, the proceedings recessed at 2:52 p.m., December 22, 1998.)

14. Ruling On The January 20, 1999, Supplemental Declaration Of Gary Victor Dubin In Further Support Of Motion By Plaintiffs' Attorneys For Reconsideration Of Denial Of Motion For Disqualification Of Honorable David Alan Ezra, Civil Nos. 98-00453 & 98-00475, filed January 27, 1999

As the record shows, attorney Dubin's Motion for Disqualification of Judge Ezra of December 21, 1998, was referred to this judge for disposition. In that Motion, attorney Dubin's Declaration stated: "When he [Judge Ezra] was a practicing attorney, I took over a case involving claims against him by one of his former clients he was suing for disputed fees, containing allegations of legal malpractice against him [Judge Ezra] personally."

In the Declaration and the moving papers accompanying it, attorney Dubin set forth other actions and statements by Judge Ezra which led him to believe that Judge Ezra was biased and prejudiced against him. No specific facts were set forth in any of the moving papers supporting any of his allegations or beliefs.

On December 30, 1998, this court filed its Denial of Motion for Disqualification, setting forth an analysis of attorney Dubin's original Motion, paragraph by paragraph, and found that attorney Dubin's Declaration and moving papers contained insinuations and innuendoes of Judge Ezra which were not substantiated by documented facts,

and that his Motion for disqualification was entirely without merit and, therefore, denied.

On January 14, 1999, attorney Dubin filed a Motion for Reconsideration of this court's December 30, 1998 Denial Order. On January 20, 1999, at 10:00 a.m., this court filed its Denial of the Motion for Reconsideration, finding that attorney Dubin had set forth no new evidence in the Motion, nor submitted any new facts to support attorney Dubin's allegations in his Motion for Reconsideration.

Unknown to this court at the time the denial Order was filed, attorney Dubin, on January 20, 1999, at 9:00 a.m., had filed with the Clerk of the Court a "Supplemental Declaration In Further Support of Motion for Reconsideration of Denial of Motion for Disqualification" of Judge Ezra.

This court has reviewed the Supplemental Declaration. In it, attorney Dubin repeats that he "represented a former client of his [Judge Ezra's] asserting claims against him [Judge Ezra]... [in a case] known as Ezra, 0 'Connor, Moon & Tam v. Sandwich Islands Construction Co. ", and again attorney Dubin claimed that his (attorney Dubin's) client was Jacob Tzur, "who made claims against [Judge Ezra's] lawyering and billing practices". Again, attorney Dubin maintains "that there were claims against him [Judge Ezra] in that action specifically that I [attorney Dubin] prosecuted on behalf of my client, Sandwich Islands Construction Company."

Attorney Dubin recited, in paragraph #7: "When Defendant Sandwich Islands Construction Company filed its Answer on July 25, 1986, before I [attorney Dubin] had appeared in the action, specifically served upon attorney Ezra on July 24, 1986, it expressly stated as its 'Fourth Affirmative Defense':

"Plaintiffs representations concerning the provision of services by Mr. Ezra constituted violations of Section 480-2

of the Hawaii Revised Statutes and are therefore barred by virtue of such violations."

Referring to the claims in defendant Sandwich Islands Construction Company's Answer to plaintiffs', Ezra, O'Connor, Moon & Tam's, Complaint, defendant alleged that "David Ezra, one of Plaintiffs principal attorneys, agreed to provide services to Defendant, a substantial portion of which services Defendant expected to be provided by David Ezra personally, but Plaintiff did not provide such services", and thereafter, as defendant's Fourth Affirmative Defense, "Plaintiffs representations concerning the provision of services by Mr. Ezra constituted violations of § 480-2 of the Hawaii Revised Statutes and are therefore barred by virtue of such violations."

The defendant's first attorney, Matthew Yingling, withdrew and attorney Dubin took over, and on November 17, 1985 attorney Dubin filed a Memorandum in Opposition to the law firm's (plaintiffs) Motion for Summary Judgment. In that Motion, it clearly appears that it was attorney Nagle of plaintiffs firm who had handled the defendant's cases against others — not then attorney Judge Ezra.

In that Motion, the only reference to Ezra was that he had violated HRS 480-2 by failing to provide, personally, enough services. With attorney Dubin's Motion was an Affidavit by Jacob Tzur, President and owner of defendant Sandwich Islands Construction Co. In that Affidavit, it clearly appears that attorney Nagle of plaintiff firm was the only attorney who handled the defendant's suits. The only mention of Judge Ezra in connection with all of the complaints which he (Tzur) had was that in effect he (Tzur) "initially hired the law firm of Ezra, O'Connor & Moon to represent [his] company in litigation... [and] he [Tzur] had been promised that Mr. Ezra would handle the case himself, yet Mr. Nagle proceeded to represent [the company}...." From Tzur's Affidavit it cannot be questioned that it was Nagle against whom Tzur had all his complaints.

Attorney Dubin manifestly distorted the facts when he said, in claim #8 of his Supplemental Declaration of January 20, 1999, that "I opposed attorney Ezra's summary judgment motion...prosecuting against attorney Ezra my client's fourth affirmative defense.. .further alleging.. .that his services 'were poor, the results poor, and the fees excessive...." All of Tzur's and attorney Dubin's claims against the law firm were solely and specifically against attorney Nagle (except for the fact that Tzur claimed that Judge Ezra had promised that he would handle a substantial portion of the case).

None of the facts set forth in the Declaration substantiate attorney Dubin's original claim "that Judge Ezra was biased and prejudiced against me" because, as set forth in paragraph 6 of attorney Dubin's Declaration of December 21, 1998, attorney Dubin had taken "over a case involving claims against him [Judge Ezra] by one of his former clients he was suing for disputed fees, containing allegations of legal malpractice against him personally".

Attorney Dubin has failed to set forth facts to substantiate his claim that Judge Ezra is biased and prejudiced against him personally arising out of extrajudicial statements or actions, or to persuade this court to alter its Denial of Motion for Reconsideration of Denial of Motion for Disqualification of Judge Ezra, dated January 20, 1999.

DATED: Honolulu, Hawaii, January 27, 1999.

/s/ MARTIN PENCE

15. Defendant Bank Of Hawaii's Submission Regarding Attorneys' Fees, Etc. (illustrating redactions), Civil Nos. 98-00453 & 98-00475, filed February 2, 1999

Invoice # 821459

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
12/28/98	KGL	[redacted] 2.50	210.0	work on opposition to disqualification of Judge Sara.	525.00
[redacted]					

Invoice # 801626 [redacted]

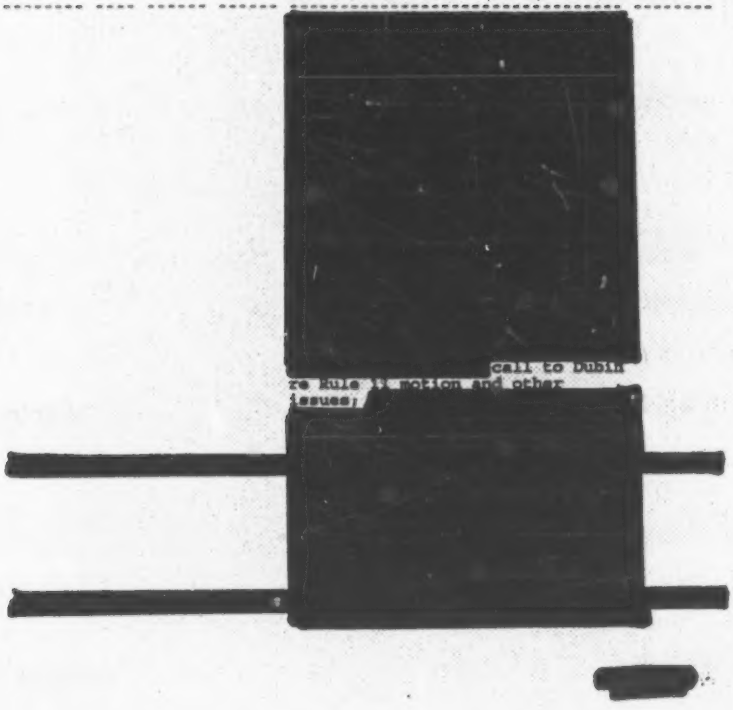
DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
8/31/98	KGL	[redacted] .20	210.00	[redacted]	42.00

[redacted]

Invoice # 801626

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					



[redacted]

Invoice # 801626 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
9/01/98	BKY	[redacted] 3.00	155.00	Perform legal research regarding the "safe harbor" exception for Rule 11 sanctions	[redacted] 465.00
[redacted]					
9/01/98	KGL	[redacted] 2.00	210.00	draft letter to G.Dubin; call from G.Dubin;	420.00
[redacted]					

Invoice # 801626

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				[redacted] draft stipulation to dismiss suits with prejudice; analyze possible continued pursuit of sanctions, including further look at timing of stated intent to withdraw pleadings and statutory basis for recovery from attorneys; draft letter to Dubin re stipulation;	

[redacted]

Invoice # 801626

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/02/98	BKY	[redacted] 4.00	155.00	Continue legal research regarding the "safe harbor" exception to Rule 11 sanctions; [redacted]	[redacted] 620.00
[redacted]					

[redacted]

Invoice # 801626 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/03/98	BKY	[redacted] 2.80	155.00	meet with K.G.Leonard to discuss Gary Dubin's threat of brining another lawsuit; perform legal research regarding defamation and an attorney's proprietary interest in his or her work product.	434.00
[redacted]					

Invoice # 801626

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
9/03/98	KGL	[redacted] 1.00	210.00	[redacted] review and analysis Dublin's letter threatening further suits verses the Bank and various attorneys re privileged documents; [redacted] follow up re [redacted] research re same.	210.00

[redacted]

Invoice # 801626

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/04/98	KGL	[redacted] 2.40	210.00	Further review and analysis re sanctions motion, Dubin letters and response to same; [redacted] draft letter to Dubin re Rule 11 motion; [redacted] telephone call with S.Batterman re federal suits; [redacted] review and file Rule 11 motion;	504.00
[redacted]					

Invoice # 801626

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/08/98	KGL	[redacted]	210.00	review ARK/JMK scheduling conference statement; review ARK/JMK's discovery plan; review Dubin letter to Magistrate Yamashita;	504.00
		2.40			
[redacted]					

Invoice # 801626 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]				draft scheduling conference statement (ARK/JMK suit);	
[redacted]				call from Harvey Plaintiffs' [redacted]	
[redacted]				revise Trustee's scheduling conference statement;	
[redacted]					

Invoice # 801626 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/09/98	KGL	[redacted] .20	210.00	[redacted] review plaintiffs' supplemental scheduling conference statement (responding to trustee's statement); [redacted] review receiver's scheduling conference statement;	42.00
[redacted]					

Invoice # 801626 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/14/98	KGL	[redacted]	210.00	review Candon's motion for sanctions; review various scheduling conference statements (in ARK/JMK suit) for 9/15 scheduling conference;	210.00
		1.00			
[redacted]					

Invoice # 801626 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/15/98	KGL	[redacted] 1.00	210.00	Attend scheduling conference before Magistrate Judge Yamashita; [redacted]	[redacted] 210.00
[redacted]					

INVOICE DATE : October 29, 1998

Bank Of Hawaii
Procurement Department #256
P.O. Box 3414
Honolulu, HI 96801
ATTENTION : Joseph T. Kiefer, Esq.
Executive Vice President

CASE NUMBER : 010028/ 1779

INVOICE NUMBER: 807280

THROUGH DATE : October 15, 1998

Bank of Hawaii-Kunimoto, Allan R., et al [redacted]

CURRENT SERVICES	$
TAX ON SERVICES	$
CURRENT COSTS	$
CURRENT TOTAL	$

[redacted]

[redacted]

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				[redacted]	
9/23/98	KGL	[redacted] 1.20	210.00	review and analyze motion filed by Dubin in Federal District court actions seekings more time regarding motions to dismiss; [redacted] telephone call from S.Battermore regarding Dubin's motion; telephone call to U.S. District Court regarding ruling on motion; [redacted]	252.00
				[redacted]	

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				[redacted]	
9/24/98	KGL	[redacted] 4.00	210.00	Further analysis of Kunimoto's joint ex parte motion and discuss same with S.Batterman; draft affidavit of K.G.Leonard responding Kunimoto's motion and request that the Court proceed with the hearings on 10/5/98; review and begin analysis of Kunimoto's opposition to motions to dismiss USDC cases; meeting with D.B.Rosen regarding legal authorities acted by Kunimoto; [redacted] continue analysis of memorandum in opposition; confer with T.VanWinkle regarding affidavit and revise same; work on formulating reply; telephone calls from Batterman and Faris regarding Dubin's memorandum; [redacted]	[redacted] 840.00
9/25/98	BKY	0.80	155.00	Meet with K.G.Leonard to discuss the Bank's reply memo in support of the Bank's motion to dismiss and motion for sanctions; review memo in opposition filed by Allan	124.00

[redacted]

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
9/25/98	DBR	[redacted] 4.20	155.00	and Jean Kunimoto. Review Kunimoto's opposition in Federal District Court to Bank of Hawaii's Motion to Dismiss; review cases cited therein; discuss with K.G.Leonard (4.2);	[redacted] 651.00
9/25/98	KGL	[redacted] 4.20	210.00	[redacted] review detailed analysis of ARK's opposition to motion to dismiss and motion for sanctions; work through analysis of cases cited by Dubin; work on drafting reply memorandum; telephone call from S.Batterman regarding same; legal research regarding same; [redacted]	882.00
					[redacted]

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
9/26/98	BKY	1.80	155.00	Review Federal District Court order granting Kunimoto and extension of time to file his memorandum in opposition to the Bank's motion to dismiss and motion for sanctions; review Kunimoto's memorandum in opposition to the Bank's motion to dismiss and motion for sanctions.	279.00
9/26/98	KGL	3.00	210.00	Work on reply memorandum regarding dismissal of USDC suits or related sanctions motions.	630.00
[redacted]					
9/28/98	BKY	5.80	155.00	Perform legal research and draft short memo to K.G.Leonard to be used in the Bank's reply memorandum in support of its motion to dismiss the Kunimoto complaints.	899.00
[redacted]					

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
9/28/98	KGL	[redacted] 6.50	210.00	[redacted] telephone call from S.Batterman regarding specific issues raised in Dubin's memorandum in opposition to various motions to discuss; work on reply memoranda; review and further analyze key authorities; draft reply memorandum regarding motion to dismiss.	1,365.00
[redacted]					
9/29/98	BKY	3.00	155.00	Revise the Bank's reply memorandum in support of its motion for sanctions; review the Bank's reply memorandum in support of motion to dismiss.	465.00
9/29/98	KGL	[redacted] 5.20	210.00	[redacted]	1,092.00

[redacted]

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				[redacted] continue to draft, revise and finalize memorandum in reply regarding motion to dismiss including further discussions with T.VanWinkle regarding draft; review draft of reply on motions for sanctions; revise and add to same; including affidavit and exhibits; file reply memorandum; [redacted] review draft of Fidell memorandum and provide comments on same to S.Batterman; [redacted]	

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
9/30/98	BKY	0.80	155.00	Review key cases used in BOH's motion to dismiss the Kunimoto complaints.	124.00
9/30/98	KGL	[redacted] .70	210.00	Review and analyze reply memorandum filed by co-defendants in ARK/JMK federal suit; [redacted]	[redacted] 147.00
10/01/98	KGL	[redacted] 3.00	210.00	Work on analysis of various arguments and legal theories/factual issues raised by Kunimoto in opposition to motions to dismiss; [redacted] identify open legal issues and conduct limited research on same, including search for further authorities supporting dismissal of JMK suit.	[redacted] 630.00
10/02/98	BKY	5.10	155.00	Meet with K.G.Leonard regarding	790.50

[redacted]

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				hearing on Monday for BOH's motion to dismiss Kunimoto complaints; review Rebuttal Declaration of Gary Dubin; draft fax transmittal to Scott Batterman regarding Dubin's declaration; perform legal research to analyze the cases cited by Dubin in his declaration.	
10/03/98	KGL	[redacted] 6.00	210.00	Work on arguments and other hearing preparation for motions to dismiss and for sactions; [redacted] telephone calls with S.Batterman and R.Faris re Monday's hearing; continue studied review of key authorities on all points argued in Bank's motion; review new pleadings filed by Dubin and conduct preliminary analysis; discuss same with T.VanWinkle; meet with B.K.Yamashita re analysis and research related to new Dubin pleading. [redacted]	[redacted] 1,260.00
10/03/98	KGL	7.50	210.00	Review and analyze new factual and legal arguments cited in Dubin's rebuttal declaration, including analysis of all cases cited therein and related cases; confer with S.Batterman and	1,575.00

[redacted]

Invoice # 807280

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				R.Faris re same; meet with T.VanWinkle and discuss strategy at hearing; draft additional argument and prepare for responses for various issues.	
[redacted]					
10/04/98	KGL	1.00	210.00	Work on oral argument for 10/5/98 hearing.	210.00
10/05/98	BKY	2.80	155.00	Continue reviewing cases cited by Dubin in his Declaration; prepare for and attend hearing for the Bank's motion to dismiss the Kunimoto complaints; review all relevant court rules.	434.00
10/05/98	KGL	[redacted] 2.80	210.00	Prepare for and attend hearing on Bank's motion to dismiss and other pending motions;	[redacted] 588.00
[redacted]				follow up re Alvaro case cited by Dubin.	
[redacted]					

Invoice # 807280 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
10/06/98	KGL	[redacted] .50	210.00	[redacted] continued research re Alvaro case; [redacted]	[redacted] 105.00
10/07/98	BKY	0.50	155.00	Review Alvaro decision, relied upon by Gary Dubin at the hearing for the Bank's Motion to Dismiss.	77.50
10/07/98	KGL	[redacted] 1.00	210.00	Follow up on Bankruptcy decision in Alvaro case referenced by Dubin; review and analyze lengthy opinion by Judge Lloyd King related to same; [redacted]	[redacted] 210.00

[redacted]

Invoice # 807280

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
10/08/98	KGL	[redacted]	210.00	review and analyze Ezra decision and discuss with J.T.Kiefer, T.VanWinkle and G.Nelson	84.00
		.40			
[redacted]					

INVOICE DATE : November 30, 1998

Bank Of Hawaii
Procurement Department #256
P.O. Box 3414
Honolulu, HI 96801
ATTENTION : Joseph T. Kiefer, Esq.
Executive Vice President

CASE NUMBER : 010028/ 1779

INVOICE NUMBER: 811879

THROUGH DATE : November 15, 1998

Bank of Hawaii-Kunimoto, Allan R., et al [redacted]

CURRENT SERVICES	$ [redacted]
TAX ON SERVICES	$
CURRENT COSTS	$
CURRENT TOTAL	$

[redacted]

[redacted]

Invoice # 811879 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
10/28/98	BKY	0.80	155.00	Review Kunimoto's motion for reconsideration of order dismissing the complaints; begin analyzing the caselaw cited in the motion.	124.00
10/28/98	KGL	[redacted] 1.00	210.00	Review and conduct preliminary analysis of Kunimoto's motion for reconsideration of Ezra's judgment and order dismissing federal suits; [redacted]	[redacted] 210.00

Invoice # 811879 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				[redacted]	
				call from S.Batterman re new motion; [redacted] confer with S.K.Yamashita re research and response to latest motion.	
				[redacted]	
10/29/98	BKY	0.40	155.00	Perform further analysis of cases cited by Dubin in motion for reconsideration.	62.00
				[redacted]	

Invoice # 811879 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
10/31/98	BKY	0.70	155.00	Continue analyzing cases cited in Kunimoto's motion for reconsideration of order dismissing complaint.	108.50
11/02/98	BKY	2.20	155.00	Perform legal research regarding legal standard for deciding a motion for reconsideration of a court order; review memorandum previously drafted on Hawaii law on recovery for loss of consortium.	341.00
[redacted]					
11/02/98	KGL	[redacted] .30	210.00	[redacted]	63.00
[redacted]					

Invoice # 811879 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				[redacted] work with S.K.Yamashita re opposition to motion to reconsider; [redacted]	
11/03/98	BKY	1.00	155.00	Begin drafting memorandum in opposition to motion for reconsideration of order dismissing the Kunimoto complaints.	155.00
[redacted]					
11/05/98	BKY	6.20	155.00	Continue performing legal research regarding loss of consortium and the applicable standard for a motion for reconsideration; continue drafting memorandum in opposition to motion for reconsideration of	961.00

[redacted]

Invoice # 811879 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				dismissal of complaints.	
				[redacted]	
11/06/98	BKY	6.50	155.00	Continue drafting memorandum in opposition to Kunimotos' motion for reconsideration of order dismissing complaints; meet with K.G.Leonard to discuss the same.	1,007.50
				[redacted]	
11/06/98	KGL	[redacted] 2.00	210.00	review and revise opposition to ARK and JMK's motion for reconsideration; call from R.Faris re same [redacted] calls from S.Batterman.	420.00
				[redacted]	
11/07/98	KGL	[redacted] 1.50	210.00	Revise and finalize opposition to motion for reconsideration; [redacted]	[redacted] 315.00
				[redacted]	

Invoice # 811879

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
11/09/98	KGL	[redacted] .50	210.00	Call from G.Dubin (threatening suit); call from Robert Faris re Motion for Reconsideration;	[redacted] 105.00
[redacted]					

Invoice # 811879

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
11/12/98	KGL	[redacted] .20	210.00	[redacted] call from Dubin re service of opposition to motion for reconsideration and follow up re same;	42.00
[redacted]					

CARLSMITH BALL
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING LAW CORPORATIONS

P.O. BOX 656
HONOLULU, HAWAII 96809-0656
(808) 523-2500

INVOICE DATE : December 29, 1998

Bank Of Hawaii
Procurement Department #256
P.O. Box 3414
Honolulu, HI 96801
ATTENTION : Joseph T. Kiefer, Esq.
Executive Vice President

CASE NUMBER : 010028/ 1779

INVOICE NUMBER: 816377

THROUGH DATE : December 15, 1998

Bank of Hawaii-[redacted]nimoto, Allan R., et al[redacted]

CURRENT SERVICES	$[redacted]
TAX ON SERVICES	$
CURRENT COSTS	$
CURRENT TOTAL	$

[redacted]

[redacted]

LATE PAYMENT CHARGE WILL BE ADDED TO ANY ACCOUNTS OUTSTANDING OVER 30 DAYS

INVOICE VERIFICATION

PAYMENT IS D

CARLSMITH BALL

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING LAW CORPORATIONS

P.O. BOX 656

HONOLULU, HAWAII 96809-0656

(808) 523-2500

Invoice # 816377

[redacted]

SERVICES RENDERED

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
11/16/98	BKY	2.00	155.00	Perform legal research regarding Kunimotos' counter-motion for sanctions.	310.00
11/16/98	KGL	[redacted] .50	210.00	[redacted] review and analyze Kunimoto's opposition to Rule 11 sanctions and discuss response for same with B.K. Yamas[redacted]	[redacted] 105.00

LATE PAYMENT CHARGE ... BE ADDED ON ... BALANCE OUTSTANDING ... 30 DAYS

CERTIFICATION

PAGE 1

CARLSMITH BALL

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING LAW CORPORATIONS

P.O. BOX 656

HONOLULU, HAWAII 96809-0656

(808) 523-2500

Invoice # 816377 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
11/17/98	BKY	5.00	155.00	Perform additional legal research regarding Rule 11 sanctions; begin drafting the Bank's memorandum in opposition to Kunimotos' counter-motion for sanctions and in support of the Bank's motion for sanctions; meet with K.G.Leonard regarding the same.	775.00
11/17/98	KGL	[redacted] 1.00	210.00	[redacted] review and analyze draft reply memo and cases cited by Dubin in Rule 11	[redacted] 210.00
					[redacted]

FE PAYMENT CHARGE WILL BE [illegible]

AMOUNTS OUTSTANDING OVER [illegible]

PAYMENT IS DU

F IDENTIFICATION

CARLSMITH BALL
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING LAW CORPORATIONS

P.O. BOX 656
HONOLULU, HAWAII 96809-0656
808 523-2500

Invoice # 816377 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				opposition/counter motion.	
				[redacted]	
11/18/98	KGL	[redacted] 2.00	210.00	Draft and revise reply memorandum on motion for sanctions; review further cases cited by Dubin in opposition to sanctions; consult with Faris and Batterman re same;	420.00
				[redacted] lengthy post-hearing meeting [redacted] with Faris and Painter re Rule 11 motion and Dubin's threats if not withdraw; [redacted]	
				[redacted]	

LATE PAYMENT CHARGE ... IS BE ADDED ON
AMOUNTS OUTSTAND ... OVER ... DAYS

TAX IDENTIFICATION

PAYMENT IS:

CARLSMITH BALL

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING LAW CORPORATIONS

P.O. BOX 656

HONOLULU, HAWAII 96[illegible]-0656

808 523-2500

Invoice # 816377 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				review draft reply in light of developments.	
[redacted]					
11/19/98	KGL	[redacted] 1.00	210.00	Prepare for and attend meeting with J. T. Kiefer re Rule 11 issues and Dubin's threats/offer of release; [redacted] further rewrite of reply memo and file same.	[redacted] 210.00
[redacted]					

[illegible] PAYMENT CHARGE WILL BE ADDED ON [illegible] IF [illegible] OUTSTANDING OVER 30 DAYS

[illegible] NOTIFICATION

[illegible] PAYMENT IS DU

CARLSMITH BALL

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING LAW CORPORATIONS

P.O. BOX 656

HONOLULU, HAWAII 96809-0656

(808) 523-2500

Invoice # 816377

[redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
11/27/98	KGL	[redacted] .50	210.00	review and analyze Dubin reply for counter motion for sanctions; telephone call with R. Faris re [redacted]	105.00

LATE PAYMENT CHARGE WILL BE ADDED ON AMOUNTS OUTSTANDING OVER 30 DAYS

TAX IDENTIFICATION

PAYMENT IS D

CARLSMITH BALL

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING LAW CORPORATIONS

[redacted]

Invoice # 816377 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				same.	
11/30/98	KGL	[redacted] 2.00	210.00	Prepare for and attend hearing on motion for sanctions, including late filed submissions to Dubin;	[redacted] 420.00

[redacted]

[redacted]

INVOICE DATE : January 31, 1999

Bank Of Hawaii
Procurement Department #256
P.O. Box 3414
Honolulu, HI 96801
ATTENTION : Joseph T. Kiefer, Esq.
Executive Vice President

CASE NUMBER : 010028/ 1779

INVOICE NUMBER: 821459

THROUGH DATE : January 15, 1999

Bank of Hawaii-Kunimoto, Allan R., et al [redacted]

CURRENT SERVICES $ [redacted]
TAX ON SERVICES $
CURRENT COSTS $
CURRENT TOTAL $

[redacted]

[redacted]

Invoice # 821459 [redacted]

SERVICES RENDERED

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
12/18/98	KGL	[redacted] .50	210.00	[redacted] review and analyze G.Young's motion for reconsideration.	105.00
[redacted]					

Invoice # 821459 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
[redacted]					
12/21/98	KGL	.50	210.00	Further analysis of motion for reconsideration, plan response to same; and talk to B.K.Yamashita about initial draft;	105.00
[redacted]					
12/22/98	BKY	5.80	155.00	Obtain and analyze Gary Dubin's motion for reconsideration of sanctions order and request for disqualification of Judge Ezra; perform legal research regarding disqualification issues; attend hearing on the motion.	899.00
12/22/98	KGL	5.40	210.00	Call from Ezra's chambers re additional motion for reconsideration and for disqualification of judge; multiple follow up calls to counsel re expedited hearing (per	1,134.00
[redacted]					

Invoice # 821459 [redacted]

DATE	ATTY	HOURS	RATE	DESCRIPTION	VALUE
				Court's request); begin legal analysis of possible strategy/legal grounds for disqualification; follow up on various means of obtaining copies of motion; review and analyze new motion [redacted] direct immediate research efforts by B.K.Yamashita and L.A.Zeitler; further analysis and preparation for hearing; attend hearing before Judge Ezra; [redacted]	
12/22/98	LAZ	3.80	175.00	Researched disqualification of federal judges and timeliness of filing motions to disqualify; researched federal contempt statute and considered viability of contempt action against plaintiff's counsel; shepardized case law re same; conferred with K.G.Leonard re results of same, [redacted]	665.00

[redacted]

16. Order, Hawaii Supreme Court, Case No. 21345, filed May 21, 1999

ORDER

Upon Consideration of Appellee Bank of Hawaii's motion for substitution of John Candon, Chapter 7 trustee for the bankruptcy estate of Allan R. Kunimoto, for Appellant Allan R. Kunimoto, the response thereto filed by Appellant Kunimoto, and the records and files herein,

IT IS HEREBY ORDERED that the motion for substitution is denied. This denial is without prejudice to John Candon, Chapter 7 bankruptcy trustee for the bankruptcy estate of Allan R. Kunimoto, moving to intervene in this proceeding if he deems it necessary.

Dated: Honolulu, Hawai'i, May 21, 1999.

/s/ PAULA NAKAYAMA

17. Report Of Special Master, Civil Nos. 98-00453 & 98-00475, filed September 20, 1999

REPORT OF SPECIAL MASTER

On August 19 and August 24, 1999, this Court held an Evidentiary Hearing pursuant to Fed. R. Civ. P. 53 to determine the reasonableness of attorneys' fees requested by Defendants Bank of Hawaii and John Candon. As more fully detailed below, this Court finds that Defendant John Candon is entitled to $40,497.41 in attorneys' fees and Defendant Bank of Hawaii is entitled to $76,364.91 in attorneys' fees.

BACKGROUND

On June 3, 1998, Allan Kunimoto filed a Complaint against Bank of Hawaii, Jay M. Fidell, Carlsmith Ball Wichman Case & Ichiki ("Carlsmith"), James R. Starshak, John Candon, and John Does 1-100 (collectively "Defendants"). The Complaint alleged that Defendants violated numerous federal criminal laws including 18 U.S.C. § 215 (corrupt bankers), 18 U.S.C. § 1341 (multiple mail fraud), 18 U.S.C. § 1343 (multiple wire fraud), 13 U.S.C. § 1344 (bank fraud),18 U.S.C. § 1952 (racketeering enterprises), 18 U.S.C. § 1961A (state law bribery), 18 U.S.C. § 1961D (bankruptcy fraud), and 18 U.S.C. § 1962 (racketeering investments). Allan Kunimoto sought $70,000,000.00 in actual damages, trebled, plus punitive damages, costs and attorneys' fees.

On June 4, 1998, Jean Kunimoto filed a Complaint against Bank of Hawaii, Jay M. Fidell, Carlsmith, James R. Starshak, John Candon, and John Does 1-100. The Complaint alleged that Defendants' actions against her husband Allan Kunimoto, as alleged in his Complaint, resulted in loss of consortium and inflicted emotional harm.

On July 29, 1998, Bank of Hawaii filed a Motion to Consolidate Plaintiffs' cases. On August 3, 1998, Carlsmith and James R. Starshak filed a joinder in Bank of Hawaii's Motion to Consolidate. On August 5, 1998, Jay M. Fidell filed a statement of support of Bank of Hawaii's Motion to Consolidate. This Court granted the Motion to Consolidate in a written order filed August 24, 1998.

On August 10, 1998, Bank of Hawaii served its Motion for Rule 11 Sanctions on Plaintiffs. Also on August 10, 1998, Bank of Hawaii, Jay M. Fidell, Carlsmith, and James R. Starshak filed separate Motions to Dismiss Plaintiffs' Complaints. On August 17, 1998, John Candon filed a Motion to Dismiss Plaintiffs' Complaints.

On October 7, 1998, Chief United States District Judge David Alan Ezra filed an Order Granting Defendants' Motions to Dismiss Plaintiffs' Complaints. In the Order, the

District Court dismissed both Kunimoto and his wife's Complaints, because both Kunimoto and his wife lacked standing to bring the action. (Order Granting Defendants' Motions to Dismiss filed October 7, 1999 at 8) . The Court noted that although Defendants raised numerous other valid grounds for dismissal, it need not address these in light of Plaintiffs' lack of standing. (Id. at 9). However, in a footnote, the District Court explained the numerous other valid grounds for dismissal of the Complaints:

> The court recognizes that Plaintiffs did not obtain permission from the bankruptcy court before bringing suit against the Trustee, did not comply with Federal Rule of Civil Procedure 9(b) 's specificity requirement, and did not comply with Local Rule 9.1 regarding filing of a RICO case statement. The court also notes that the Trustee and the Receiver raise immunity defenses because they are being sued in their official capacities. Moreover, the doctrines of res judicata and collateral estoppel likely prohibit the bringing of most of Plaintiffs' claims, in that the same issues raised in Counts One, Three, Four, Five, Six, and Seven were previously adjudicated in state court. Finally, to the extent that Plaintiffs allege a deprivation of "constitutional fair trial rights" in Count Nine, such a claim is not properly aimed at the named Defendants.

(Id. at 9 n.2)

On September 4, 1998, Bank of Hawaii filed a Motion for Rule 11 Sanctions against Plaintiffs and their attorneys, Gary Victor Dubin and Gregg Young, pursuant to Federal Rule of Civil Procedure 11. On September 24, 1998, Jay M. Fidell filed a Motion for Rule 11 Sanctions. On October 2, 1998, John Candon filed a Motion for Rule 11

Sanctions. Plaintiffs filed a Counter Motion for Sanctions against Defendants on November 12, 1998.

On December 7, 1998, Judge Ezra filed an Order Granting Defendants' Motions for Sanctions and Denying Plaintiffs' Counter Motion for Sanctions. Upon review of each of the separate motions for sanctions, Judge Ezra determined that Plaintiffs' Complaints were frivolous and were "filed for the improper purpose of harassing and pressuring the Defendants to settle other pending litigation." (Order Granting Defendants' Motions for Sanctions; Order Denying Plaintiffs' Counter Motion for Sanctions ("Sanctions Order") at 4)

Based on this finding, Judge Ezra awarded Bank of Hawaii, Jay M. Fidell, and John Candon reasonable attorneys' fees incurred for the entire action to be paid by Plaintiffs' attorneys, Gary Victor Dubin and Gregg Young.[1] See id. at 10. As Judge Ezra stated:

> After careful consideration, the court finds that an award of attorneys' fees is the appropriate sanction. "In a case like this, where the original complaint is the improper pleading, all attorney fees reasonably incurred in defending against the claims asserted in the complaint form the proper basis for sanctions." Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993) . The district court has wide discretion in awarding attorneys' fees under Rule 11. United States v. 87 Skyline Terrace, 26 F.3d 923, 929 (9th Cir. 1994). "A restitutionary award compensating the opposing party for unnecessary litigation expenses--as opposed to a punitive fine paid to the court--is a particularly appropriate sanction in cases involving manipulative petitions filed principally for purposes of delay and harassment." Marsch v. Marsch, 36 F.3d

825, 831 (9th Cir. 1994) (discussing the imposition of Rule 9011 sanctions)

Id. at 9-10.

[1] Because Judge Ezra's Order was clear that this Court should calculate the total fees incurred since the filing of the frivolous Complaint, this Report of Special Master does not consider Messrs. Dubin and Young's argument that only fees relating to the "standing" issue should be compensated. (~ Plaintiffs' Attorneys' Joint Notice of Objections filed July 14, 1999 at 2; see also Plaintiffs' Attorney Gregg Young's Memorandum in Opposition to the Fees Requested by Defendants Bank of Hawaii and John Candon filed August 28, 1999 at 6-7) . The District Court was explicit that all attorney fees reasonably incurred in defending against the claims asserted in the Complaint form the proper basis for sanctions.

In denying Plaintiffs' Motion for Sanctions, Judge Ezra found that Defendants did not act recklessly or in bad faith by filing Motions for Sanctions and that Plaintiffs "failed to abide by the 21 day 'safe harbor' provision of Rule 11." Id. at 10. Judge Ezra then designated the matter to this Court as Special Master pursuant to Fed. R. Civ. P. 53 for calculation of the amount of reasonable attorneys' fees to be paid by Plaintiffs' attorneys, Mr. Dubin and Mr. Young, to Defendants. See id.

Defendant Bank of Hawaii filed its Submission Regarding Attorneys' Fees on February 9, 1999. Defendant Candon filed his submission on May 14, 1999. Plaintiffs' attorneys did not respond to either Defendant Bank of Hawaii's or Defendant Candon's submissions. On June 14, 1999, this Court, as Special Master, awarded attorneys' fees and state taxes to Defendant Bank of Hawaii in the amount of $72,112.05 and to Defendant Candon in the amount of $9,241.08.

On June 21, 1999, Plaintiffs' counsel filed an Ex Parte Motion for (1) relief from, and/or (2) reconsideration of, and/or (3) stay of, and/or (4) enlargement of time in which to file objections to and/or in which to appeal to a district court judge from the Honorable Francis I. Yamashita's June 14, 1999 Report of Special Master. The motion, which was construed as a appeal from the Special Master's Reports, was considered by Chief United States District Judge David Alan Ezra.

On June 29, 1999, Judge Ezra issued an Order vacating the Special Master Reports in order to permit Plaintiffs' attorneys to file responses to Defendants' submissions. In the Order, Judge Ezra noted that it was curious that Plaintiffs' attorneys failed to either respond to Defendants' submissions or to contact the court in regards to scheduling questions, but nonetheless invoked the rule of leniency and vacated the Special Master's Reports to allow Plaintiffs' counsel time to file their response. Judge Ezra then ordered that Plaintiffs' attorneys file their responses to Defendant Bank of Hawaii's and Defendant Candon's submissions within 15 days of the order.[2]

[2] The deadline thus required Plaintiffs' attorneys to file their responses by July 14, 1999.

Although Judge Ezra granted Plaintiffs' attorneys' Motion, Plaintiffs' counsel filed a Motion for Partial Reconsideration of June 29, 1999 "Order Granting Plaintiffs' Attorneys' Joint Ex Parte Motion for (1) relief from, and/or reconsideration of, and/or (3) objections to and/or in which to appeal to a district court judge from the Special Master's Report on July 9, 1999.

On July 16, 1999, Judge Ezra filed an Order Granting in Part and Denying in Part Plaintiffs' Attorneys' Motion for Partial Reconsideration. In the Order, Judge Ezra reaffirmed his prior briefing schedule and granted Plaintiffs' attorneys' request for an evidentiary hearing. Judge Ezra directed this Court to "schedule a hearing upon completion

of the previously ordered briefing." (July 16, 1999 Order at 5). Judge Ezra carefully explained the limited purpose of the evidentiary hearing:

> The court notes that the only subject on which the parties shall be heard is the proper calculation of attorneys' fees. Plaintiffs' attorneys may not reargue the appropriateness of the sanctions themselves.

Id.

Pursuant to the District Court's Order, this Court held an evidentiary hearing on August 19 and August 24 l999.[3] Following the completion of the hearing, this Court directed each of the Parties (Bank of Hawaii, John Candon, Mr. Dubin, and Mr. Young) to submit post-hearing memorandums, not to exceed 15 pages, for the benefit of the Court. This Court further requested that Defendants Bank of Hawaii and Candon submit affidavits detailing the fees incurred as a result of seeking the sanctions award.

[3] This Court originally allocated two hours on August 19, 1999 for completion of the hearing. However, at the request of Messrs. Dubin and Young, this Court allocated an additional two hours for completion of the hearing on August 24, 1999.

On September 1, 1999, this Court issued an Order Requesting Submissions in which it requested that Bank of Hawaii submit the complete, unredacted billing statements under seal for this Court's in camera review. These statements, which include the complete, unredacted invoices for the Bank of Hawaii/Kunimoto matters, were filed with the Court on September 7, l999.[4]

[4] Mr. Dubin filed a Notice of Objection by Real Party in Interest Gary Victor Dubin to Order Requesting Further Submissions Filed August 31, 1999 on September 8, 1999. Although the Court notes the objection, this Court also notes

that Mr. Dubin himself suggested that this Court conduct an in camera review of the entire billing records, if necessary, in order to determine whether the requested fees were reasonable. As Mr. Dubin stated: "Given the seriousness of this apparent dishonesty waged upon the Plaintiffs' attorneys and this federal court, it is respectfully suggested that the Special Master, before completing his report, should immediately sequester Carlsmith's time sheets." (Summary Statement by Gary Victor Dubin filed August 30, 1999 at 6).

Based on this Court's review of all of the evidence presented in this case, including the unredacted billing statements submitted by Bank of Hawaii, this Court issues the following Report of Special Master.

DISCUSSION

I. GENERAL OBJECTIONS

Because of the contentiousness of the issue of proper fee calculation, this Court feels compelled to preliminarily address the general objections made by Messrs. Dubin and Young applicable to both fee applications prior to addressing the specific calculation issues in each of the Defendants' fee requests. Therefore, this Court begins by addressing these general objections.

A. Scope of Award

Messrs. Dubin and Young argue that Defendants are not entitled to recover the cost of work done on issues other than standing. (Plaintiffs' Joint Objections at 2). Messrs. Dubin and Young are wrong. Just as in Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993), Judge Ezra found that the complaints were frivolous in their entirety, primarily (but not only) because the plaintiffs lacked standing to assert any of the claims which they attempted to state. (See Order dated October 7, 1998 at 8; Order dated December 7, 1998 at 4.) Citing Marsch v. Marsch, 36 F.3d 825, 831 (9th Cir. 1994),

the Court found that a restitutionary award compensating the opposing party for unnecessary litigation expenses was the appropriate sanction in a case involving manipulative petitions filed principally for purposes of delay and harassment. (Order filed December 7, 1998 at 9-10.) Thus, contrary to the assertions of Messrs. Dubin and Young, the sanctions properly awarded are not limited to the fees incurred on the standing issue.

B. Costs of Preparing Motion for Sanctions

Messrs. Dubin and Young argue that the hours and costs incurred in the preparation, arguing, and prosecution of a sanctions motion should not be included in sanctions imposed by the district court. (Plaintiffs' Joint Objections at 2.) For this proposition, they cite Lockary v. Kavfetz, 974 F.2d 1166, 1177-78 (9th Cir. 1992). Messrs. Dubin and Young are mistaken. The Ninth Circuit Court of Appeals has held that Lockary is no longer good law. Buster v. Greisen, 104 F.3d 1186, 1190 n. 4 (9t~1 Cir. 1997)

As the Court stated:

> The rule in Lockary, enunciated in 1992, is no longer good law. The December 1, 1993 amendment to Rule 11 specifically allows a district court to include the costs associated with sanctions proceedings: "the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Fed. R. Civ. P. 11(c) (1) (A). This Court has previously noted that the plain text of Rule 11 supercedes the former rule in this Circuit disallowing Rule 11 motion-related costs and fees. See Buster v. Greisen, 104 F.3d 1186, 1190 n. 5 (9th Cir. 1997) Accordingly, the district court did not err by including in the amount awarded the costs

and fees borne by defendants-appellees in bringing the motion for sanctions.

Margolis v. Ryan, 140 F.3d 850, 854-855 (9th Cir. 1998)

C. Objections That Sanctions Should Not Be Awarded

Messrs. Dubin and Young have made numerous objections challenging the propriety of the District Court's determination that sanctions were appropriate. Plaintiffs' argument asks this Court to overrule or ignore the District Judge's decision that Messrs. Dubin and Young should be sanctioned. Any such argument is contra to Judge Ezra's December 7, 1998 Order and this Court's limited power under Fed. R. Civ. P. 53.

D. Staffing of Cases by Multiple Attorneys

Messrs. Dubin and Young argue that billing entries made by attorneys who did not "sign documents" or attend hearings should not be compensated. Their argument is simply not supported by the case law. Law firms normally utilize the services of several attorneys to conduct research or consult on questions which arise in the case, but who never personally appear. Although Defendants' have the burden to prove that the fees requested are reasonable, there is no legal support for the position that fees incurred by attorneys who perform tasks other than signing documents or attending hearings are per se unreasonable.

However, although staffing of cases by multiple attorneys is not per se unreasonable, this Court has undertaken a careful analysis of the billing records submitted by Defendants. Having done so, this Court has eliminated hours claimed for "second chair" staffing at routine hearings, repetitive reviews of the case file, and clerical tasks. Having done so, this Court finds that the remaining time entries are entirely reasonable.

E. Excise Taxes

Messrs. Dubin and Young argue that general excise taxes may not be added to attorneys' fees in Rule 11 sanctions. (Plaintiffs' Joint Objections at 7). The Ninth Circuit Court of Appeals, however, has specifically affirmed a district court's award of Hawaii's 4% excise tax. See In re THC Financial Corporation, 659 F.2d 951, 956 (9th Cir. 1981). As the Ninth Circuit stated:

> Appellants argue that the tax is not a compensable expense because it is more akin to overhead, which is not recoverable . . . . The attorneys argue that the tax should not be viewed as an expense at all, but rather as part of the compensation awarded by the district court and that, so viewed, it is reasonable.
>
> We agree with the attorneys' characterization. . . . It thus appears from the record that the accepted practice of much of the Hawaii bar is to pass this tax along to clients as a surcharge in addition to the hourly rate.
>
> Viewed as compensation, it is reasonable that it be awarded.

Id. Thus, the Ninth Circuit has properly characterized the excise tax as part of the normal compensation of Hawaii's attorneys. Accordingly, this Court finds that the excise tax is properly included in any fee award which is of a restitutionary nature.

F. Inability to Pay Rule 11 Sanctions

Messrs. Dubin and Young argue that this Court should consider their inability to pay Rule 11 sanctions and therefore decline to make any award to Defendants. In support of this contention, Mr. Dubin entered the Declaration of Gary Victor Dubin into evidence at the

evidentiary hearing as Plaintiffs' Exhibit A. Likewise, Mr. Young entered the Declaration of Gregg Young into evidence as Plaintiffs' Exhibit B.

A court can properly consider ability to pay monetary sanctions as one factor in assessing sanctions. Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994) . However, the Ninth Circuit has held that the sanctioned party bears the burden of producing evidence of inability to pay. Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993) . As the Ninth Circuit stated, "Simple logic compels this result: the sanctioned party knows best his or her financial situation." Id. at 629.

Thus, Messrs. Dubin and Young, as the sanctioned parties, had the burden to produce probative evidence of their inability to pay the sanctions. Having carefully considered their declarations, this Court finds that they did not do so.[5]

[5] Mr. Young's Declaration sheds no light on his assets, detailing only his recent taxable income. Mr. Dubin's Declaration is silent regarding his current income. Mr. Dubin claims he is hopelessly in debt because of his financial collapse following his conviction for willful failure to file income tax returns and incarceration, and a subsequent IRS assessment for fraudulent failure to file, in an amount said to exceed $2 Million. However, Mr. Dubin's Declaration does not account for his assets or liabilities and is not probative evidence of his ability to pay sanctions.

II. ATTORNEYS' FEES FOR JOHN CANDON

Counsel for John Candon request attorneys' fees in the amount of $32,230.00 and tax in the amount of $1,340.77 for a total of $33,570.77. In addition, counsel for Candon have submitted a fee request for preparing for and attending the evidentiary hearing in the amount of $9,669.69 including tax.

A. Entitlement to Attorneys' Fees

Based upon the award of reasonable attorneys' fees by Chief United States District Judge David Alan Ezra, this Court does not need to determine whether Candon is entitled to said fees. This Court must only determine whether Candon's attorneys' fees are reasonable.

B. Reasonableness of Attorneys' Fees

Under federal law, reasonable attorneys' fees are based on the traditional "lodestar" calculation, as set forth in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) . In Hensley, the Supreme Court stated that the most useful starting point to determine a reasonable fee is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." ~ at 433. Once calculated, the lodestar is presumptively reasonable. ~ Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 728 (1987); Cunningham v. County of Los Angeles, 879 F.2d 481, 484 (9th Cir. 1988)

In his Submission dated May 14, 1999, Candon requests the following lodestar:

Attorney	Hours	x	Rate	Lodestar
Simon Klevansky	5.55	X	$240.00	$1,332.00
Robert J. Fans	55.9	X	$210.00	$11,739.00
James Kawashima	101.1	X	$150.00	$15,165.00
	12.4	X	$160.00	$ 1,984.00
Jonathan B. Gelber	20.1	X	$100.00	$2,010.00
Total Fees				$ 32,230.00
Hawaii General Excise Tax				$ 1,340.77
TOTAL REQUESTED LODESTAR				$ 33,570.77

In his Declaration of Counsel Respecting Time and Fees in Connection With Evidentiary Hearing on Rule 11 Sanctions, counsel for Candon request the following lodestar for work performed in conjunction with the evidentiary hearing on appropriate calculation of sanctions:

Attorney	Hours x Rate	Lodestar
Don J. Gelber	16.96[6] X	$295.00
	$4,985.50	
Robert J. Faris	18.0[7] X	$210.00
	$3,780.00	

[6] This includes 3.0 hours requested for the preparation of the 15 page post-hearing memorandum which this Court directed all parties to file.

[7] This includes 3.0 hours requested for the preparation of the 15 page post-hearing memorandum which this Court directed all parties to file.

James S. Kawashima	2.30	X $160.00	$	368.00
Jonathan B. Gelber	1.5	X $100.00	$	150.00
Total Fees	$	9,283.00		
Hawaii General Excise Tax			386.18	
TOTAL REQUESTED LODESTAR			$	9,669.68

1. Reasonable Hourly Rate

In determining a reasonable hourly rate, the district court must consider "the experience, skill, and reputation of the attorney requesting fees." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986) . In light of these factors, the rate should reflect "the prevailing market rate in the community." Id. Moreover, the fee applicant "has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel," to show that the rates are reflective of reasonable prevailing rates for similar services.

Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987)

Candon has requested hourly rates for his attorneys ranging from $100 to $240. Candon's Counsel has included in his Submission a copy of the curriculum vitae for his law firm, Gelber, Gelber, Ingersoll, Klevansky & Faris ("Gelber"), which briefly illustrates the extent of each attorney's background and experience. (See Ex. 3 to Def. 's Submission)

Four attorneys from Gelber, Simon Klevansky, Robert J. Fans, James S. Kawashima, and Jonathan B. Gelber, performed the work on Candon's case. All four attorneys are graduates of highly respected law schools.[8] Each attorney charges an hourly rate commensurate with his experience.[9] Although Candon's Counsel failed to state that the rates charged were reasonable, this Court is well aware of the prevailing rates for similar services performed by attorneys of comparable experience, skill, and reputation in this legal community. Moreover, Messrs. Dubin and Young have not contested nor argued that the hourly rates were excessive or unreasonable given the experience, skill and reputation of Candon's attorneys. Based upon a review of Candon's Submission and this Court's independent knowledge of the rates charged in this legal community, this Court finds that the rates charged by the firm of Gelber, Gelber, Ingersoll, Klevansky & Faris in this case are reasonable.

[8] Mr. Klevansky received his J.D. from Stanford Law School in 1977; Mr. Faris received his J.D. from Boalt Hall School of Law, University of California, Berkeley, in 1983; Mr. Kawashima received his J.D. from University of Southern California in 1992; Mr. Gelber received his J.D. from the William S. Richardson School of Law at the University of Hawaii in 1998.

[9] For example, Mr. Klevansky, with over 20 years of experience, charges $240 per hour, while Mr. Gelber, with only one year of experience, charges $100 per hour.

2. Hours Reasonably Expended

Beyond establishing a reasonable hourly rate, a prevailing party seeking attorneys' fees bears the burden of proving that fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained. See Tirona v. State Farm Mut. Auto. Ins. Co., 821 F. Supp. 632, 636 (D. Haw. 1993) (citations omitted)

Although there is no precise rule or formula for determining the success of litigation and the appropriate amount of compensation, "[the court necessarily has discretion in making this equitable judgment." Hensley at 436-37. In reducing a fee request, the court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." Id.

Hours reasonably expended must be limited to the hours necessary to perform legal services which require the skills and experience of attorneys at these levels. The hours must have been spent to obtain the relief requested and to achieve the results obtained.

a. Hours Expended May 14, 1999 Submission

This Court has carefully reviewed Defendant John Candon's Submission Regarding Attorneys' Fees Awarded Pursuant to the Order Granting Defendants' Motions for Sanctions. The time entries carefully and adequately describe each of the tasks performed by the respective attorneys. Having read the entries and considered the objections of Messrs. Dubin and Young, this Court finds that the hours requested are reasonable in their entirety.[10]

[10] Although this Court has conducted its own independent review of the fees requested, this Court notes that United States Bankruptcy Judge Lloyd King has also found the fees requested by Candon's counsel to be reasonable. (See Candon's Submission, Exhibits 5, 6.) Because the Bankruptcy Court has directed that the bankruptcy estate bear all of the expense of defending the Trustee in this litigation, the bankruptcy estate, not the Trustee or his counsel, is the victim of this frivolous litigation. Any recovery in these proceedings will be paid to the bankruptcy estate to compensate the estate for these damages. Consequently, there is no issue of "double recovery."

Accordingly, this Court [sic] makes the following award based upon Candon's May 14, 1999 Submission:

Attorney	Hours	x Rate	Lodestar
Simon Klevansky	5.55	X $240.00	$ 1,332.00
Robert J. Faris	55.9	X $210.00	$ 11,739.00
James Kawashima	101.1	X $150.00	$ 15,165.00
	12.4 X $160.00	$ 1,984.00	
Jonathan B. Gelber	20.1	X $100.00	$ 2,010.00
Total Fees		$ 32,230.00	
	Hawaii General Excise Tax		$1,340.77
	TOTAL LODESTAR		$33,570.77

b. Hours Expended In Connection With Evidentiary Hearing Counsel for Candon request compensation for a total of 38.70 hours for preparing for and attending the evidentiary hearing on August 19 and August 24, 1999. The Ninth Circuit has not squarely addressed whether fees incurred in an evidentiary hearing to determine the appropriate amount of sanctions may be awarded to a prevailing defendant. However, it is clear that reasonable expenses and attorneys' fees incurred in presenting the motion for sanctions may be awarded. Margolis v. Ryan, 140 F.3d 850, 854-855 (9th Cir. 1998); see also Fed. R. Civ. P. 11(c) (1) (A) . Because fees on the motion for sanctions may be awarded, this Court finds that reasonable expenses

incurred in determining the appropriate amount of sanctions should also be compensated.

Having carefully reviewed the submission filed August 30, 1999, this Court finds that the hours requested are slightly excessive given the limited scope of the hearing. Accordingly, this Court reduces the number of hours for preparation and attendance at the evidentiary hearing as follows:

Attorney	Hours	x	Rate	Lodestar
Don J. Gelber	14.0	X	$295.00	$ 4,130.00
Robert J. Faris	12.0	X	$210.00	$ 2,520.00
James S. Kawashima	0.0	X	$160.00	$ 0.00
Jonathan B. Gelber	0.0	X	$100.00	0.00
Total Fees	$	6,650.00		
Hawaii General Excise Tax				276.64
TOTAL LODESTAR	$6,926.64			

c. Total Lodestar Amount Awarded to Candon

In accordance with the foregoing, this Court awards Defendant John Candon the following attorneys' fees:

Fees incurred 6/3/98 to 1/21/99	$ 32,230.00
Fees incurred for evidentiary hearing	$ 6,650.00
General Excise Tax (4.16%)	$ 1,617.41
TOTAL LODESTAR AWARDED	$ 40,497.41

III. ATTORNEYS' FEES FOR BANK OF HAWAII

A. Entitlement to Attorneys' Fees

Based upon the award of reasonable attorneys' fees by Chief United States District Judge David Alan Ezra, this Court does not need to determine whether Bank of

Hawaii is entitled to said fees. This Court must only determine whether Bank of Hawaii's attorneys' fees are reasonable.

B. Reasonableness of Attorneys' Fees

Under federal law, reasonable attorneys' fees are based on the traditional "lodestar" calculation, as set forth in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) . In Hensley, the Supreme Court stated that the most useful starting point to determine a reasonable fee is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." id. at 433. Once calculated, the lodestar is presumptively reasonable. See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 728 (1987); Cunningham v. County of Los Angeles, 879 F.2d 481, 484 (9th Cir. 1988)

Bank of Hawaii requests the following lodestar in its Submission Regarding Attorneys' Fees filed February 9, 1999:

Attorney	Hours x Rate	Lodestar	
Katherine G. Leonard	185.8	X $210.00	$ 39,018.00
	8.5	X$195.00	$ 1,657.50
Brent K. Yamashita	150.9	X $155.00	$ 23,389.50
	7.5	X $145.00	$ 1,087.50

Tom Roesser	2.7	X	$230.00	$621.00
Steve Egesdal	12.0	X	$200.00	$2,400.00
David Rosen	4.2	X	$155.00	$651.00
Loren Zeitler	3.8	X	$175.00	$665.00
Josh Kammerer	15.6	X	$90.00	$1,404.00
Total Fees	$ 70,893.50			
Hawaii General Excise Tax	$ 2,949.17			
TOTAL REQUESTED LODESTAR	$ 73,842.67			

In addition, Bank of Hawaii has submitted an affidavit detailing the attorneys' fees incurred in preparation for and attendance at the evidentiary hearing on the issue of proper fee calculation. In this affidavit, Bank of Hawaii requests the following fees:

Attorney	Hours x Rate	Lodestar
Nenad Krek	81.1 x $250.00	$ 20,275.00
Katherine G. Leonard	39.8 x $210.00[11]	$ 8,358.00
Steven M. Egesdal [12]	5.0 x $210.00	$ 1,050.00
David B. Rosen [13]	4.6 x $165.00	$759.00
Brent Yamashita [14]	6.2 x $165.00	$ 1,023.00
Tom E. Roesser[15]	5.1 x $240.00	$ 1,224.00
Total Fees	$ 32,689.00	
General Excise Tax	$ 1,359.87	
TOTAL LODESTAR REQUESTED		$ 34,048.87

[11] In the affidavit filed August 30, 1999, the rate requested for Ms. Leonard is $225.00, although the rate used for calculation on page 9 of the affidavit is $250.00. This Court declines to use either rate and instead uses a rate of $210.00 per hour as requested by Ms. Leonard in Bank of Hawaii's February 9, 1999 Submission.

[12] Steven Egesdal did not work on the preparation for the evidentiary hearing but appeared at the hearing as a subpoenaed witness at the request of Messrs. Dubin and Young.

[13] David Rosen did not work on the preparation for the evidentiary hearing but appeared at the hearing as a subpoenaed witness at the request of Messrs. Dubin and Young.

[14] Brent Yamashita did not work on the preparation for the evidentiary hearing but appeared at the hearing as a subpoenaed witness at the request of Messrs. Dubin and Young.

[15] Tom Roesser did not work on the preparation for the evidentiary hearing but appeared at the hearing as a subpoenaed witness at the request of Messrs. Dubin and Young.

1. Reasonable Hourly Rate

In determining a reasonable hourly rate, the district court must consider "the experience, skill, and reputation of the attorney requesting fees." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986) . In light of these factors, the rate should reflect "the prevailing market rate in the community." Id. Moreover, the fee applicant "has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel," to show that the rates are reflective of reasonable prevailing rates for similar services. Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987).

Bank of Hawaii has requested hourly rates for its attorneys ranging from $90 for a summer associate to $230 for a Carlsmith partner. In a declaration submitted to the court ("Affidavit"), Joseph T. Kiefer, Executive Vice President and General Counsel for Bank of Hawaii, stated that the hourly rates charged by Bank of Hawaii's Counsel were "reasonable rates comparable to those customar[ily] paid by Bank of Hawaii under similar circumstances." (Aff. at 3).

Two attorneys from Carlsmith, Katherine G. Leonard and Brent K. Yamashita, performed most of the work on Bank of Hawaii's case (Bank of Hawaii's Submission, Exhibit 2). Ms. Leonard is a Carlsmith partner whose "experience, reputation, and abilities were judged by [Mr. Kiefer] and others at the Bank very favorably, based in part on her representation of the Bank in numerous other proceedings." (Aft. at 2). Mr. Yamashita is a graduate of a well-respected law school, and his rate is comparable to that paid by Bank of Hawaii for attorneys with similar skill and experience. (Bank of Hawaii's Submission at 6; Aff. at 3).

Plaintiffs have not contested nor argued that the hourly rates were excessive or unreasonable given the experience, skill and reputation of Bank of Hawaii's attorneys. Moreover, this Court is well aware of the prevailing rates in the legal community. Based upon a review of the affidavit submitted and this Court's independent knowledge of the rates charged in this legal community, this Court finds that the rates charged by the firm of Carlsmith Ball Wichman Case & Ichiki in this case are reasonable.

2. Hours Reasonably Expended

Beyond establishing a reasonable hourly rate, a prevailing party seeking attorneys' fees bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir. 1992). The court may reduce the applicant's hours where documentation of the hours is inadequate, if the case was overstaffed and hours were duplicative, and if the hours expended were unnecessary or excessive. Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1985)

Although there is no precise rule or formula for determining the success of litigation and the appropriate amount of compensation, "[t]he court necessarily has discretion in making this equitable judgment." Hensley at 436-37. In reducing a fee request, the court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." ~ Hours reasonably expended must be limited to the hours necessary to perform legal services which require the skills and experience of attorneys at these levels. The hours must have been spent to obtain the relief requested and to achieve the results obtained.

a. Fees Requested in Bank of Hawaii's February 5, 1999 Submission.

Messrs. Dubin and Young challenge Bank of Hawaii's time records as being inadequate, because Bank of Hawaii's attorneys "bundled" or "lumped" their time. Messrs. Dubin and Young argue that because Bank of Hawaii's attorneys commonly recorded a number of separate tasks under single blocks of time, this Court is unable to determine how much time was reasonably spent on each task. Consequently, argue Messrs. Dubin and Young, this Court should deny Bank of Hawaii's fee request in its entirety.

Although this argument has some minor facial appeal, it is not well-supported in the case law. As the Supreme Court noted in Hensley v. Eckerhart, 461 U.S. 424 (1983), "[p]laintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." Hensley, 461 U.S. at 437 n. 12. Thus, "[a]lthough bundled time entries are regrettably common in today's legal economy, the fact that time entries are bundled does not, by itself, signify that a fee application is fatally flawed." Marbled Murrelet v. Pacific Lumber Company, 163 F.R.D. 308 (N.D. Cal. 1995).

In this case, Bank of Hawaii's counsel lumped many entries together over the course of a day. In addition, Bank of Hawaii's counsel occasionally lumped work for unrelated Bank of Hawaii/Kunimoto matters together with the work performed on this case. Ms. Leonard, counsel for Bank of Hawaii, testified at the evidentiary hearing that she later redacted portions of the time entries that were unrelated to this case and reduced the hours requested accordingly.[16] Ms. Leonard also testified that the hours that she requested following the redactions are likely less hours than actually expended on the work, as she erred on the side of billing caution.

[16] Although Messrs. Dubin and Young argue that Bank of Hawaii's billing records were not maintained contemporaneously, it is clear that each attorney did record

his or her work on a daily basis. Because Ms. Leonard had lumped multiple tasks together, Ms. Leonard did, however, later reduce and redact some of the hours she billed to reflect only the time spent on this case. Although Bank of Hawaii's Submission reflects a mix of contemporaneous records and non-contemporaneous redactions, this does not justify an automatic reduction in the hours claimed. See Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1557 (9th Cir. 1989) (holding that lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation)by Ms. Leonard, the hours claimed for the tasks performed were generally quite reasonable.

Although the lumped time entries do not in and of themselves flaw Bank of Hawaii's fee application, this Court has chosen to err on the side of caution. To this end, this Court has conducted an in camera inspection of the unredacted billing records submitted by Bank of Hawaii at this Court's request. This Court has carefully conducted a line-by-line, side-by-side comparison of the unredacted billing records against those submitted in Bank of Hawaii's February 5, 1999 Submission.

Having done so, this Court makes several general observations. First, the vast majority of redacted time entries were redacted in their entirety as unrelated to this case. Thus, most of the remaining time entries are indeed "contemporaneous" records that were transcribed on the same day as the services were performed. As for those time entries that were partially redacted.

Nevertheless, a number of the partially redacted entries did not contain sufficient information for this Court to identify whether the hours requested were reasonable in light of the redactions. In addition, several time entries requested time for services of a clerical nature. Where

documentation of the hours is inadequate, or where the hours expended were unnecessary or excessive, the appropriate remedy is for this Court to eliminate or reduce the hours expended. Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1985) . Accordingly, this Court makes the following time entry reductions based on its careful analysis of Bank of Hawaii's February 5, 1999 Submission and the Court's in camera review of Bank of Hawaii's unredacted billing statements.

Having carefully reviewed each of the time entries made by counsel for Sank of Hawaii, this Court finds that $63,659.47 reflects the reasonable amount of attorneys' fees incurred by Bank of Hawaii as a result of the frivolous suits filed by Messrs. Dubin and Young. Although Messrs. Dubin and Young argue that Sank of Hawaii's attorneys are guilty of "piling on" fees by billing needlessly for unnecessary hours, this Court's careful analysis of the billing records indicates that Messrs. Dubin and Young themselves accounted for the large fees in this case. By filing frivolous Complaints and numerous baseless motions, Messrs. Dubin and Young created this paper war. They may not now cry foul as they fall victim to the battle.

b. Bank of Hawaii's Attorneys' Fees Incurred In Conjunction With Evidentiary Hearing

As previously discussed, this Court finds that attorneys' fees incurred in determining the appropriate amount of sanctions are compensable under Fed. R. Civ. p. 11(c) (1) (A). However, this Court finds that the hours incurred by the Bank of Hawaii attorneys who were subpoenaed for testimony at the hearings on August 19 and August 24, 1999 are not compensable, as these hours would not normally be billed to a fee paying client. Further, fees and cost expended to secure the quashing of a subpoena should be accounted for pursuant to Fed. R. Civ. p. 45, not the instant proceedings.

Having carefully reviewed the request, this Court finds that it is excessive given the limited scope of the hearing. Therefore, this Court reduces the fees granted to eliminate unnecessary or duplicative fees as follows:

c. Total Lodestar Amount Awarded to Sank of Hawaii
In accordance with the foregoing, this Court awards

Defendant Sank of Hawaii the following attorneys' fees in accordance with Judge Ezra's December 7, 1998 sanctions Order:

Fees incurred 6/3/98 to 1/11/99 and General Excise Tax (4.16%) thereon $ 63,659.47

Fees incurred for evidentiary hearing and General Excise Tax (4.16%) thereon $ 12,705.44

TOTAL LODESTAR AWARDED $ 76, 364.91

CONCLUSION

In accordance with the foregoing, the Special Master finds that:

1. Defendant John Candon should be awarded $40,497.41 in attorneys' fees to be paid by Messrs. Dubin and Young in accordance with the District Court's December 7, 1998 Order Granting Defendants' Motions for Sanctions and Denying Plaintiffs' Counter Motion for Sanctions.

2. Bank of Hawaii should be awarded $76,364.91 in attorneys' fees to be paid by Messrs. Dubin and Young in accordance with the District Court's December 7, 1998 Order Granting Defendants' Motions for Sanctions and Denying Plaintiffs' Counter Motion for Sanctions.

IT IS SO FOUND. /s/ FRANCIS I. YAMASHITA

DATED: Honolulu, Hawaii, September 20, 1999.

18. Final Judgment Awarding Rule 11 Sanctions, Civil Nos. 98-00453 & 98-00475, filed January 18, 2000

FINAL JUDGMENT AWARDING RULE 11 SANCTIONS

Pursuant to (1) Rule 58 of the Federal Rules of Civil Procedure, (2) the Order Granting Defendants' Motions for Sanctions and Denying Plaintiffs' Counter Motion for Sanctions, filed on December 7, 1998, (3) the Order Denying Plaintiffs' Motions for Reconsideration of Sanctions, filed on February 4, 1999, (4) the Report of Special Master, filed on September 20, 1999, (5) the Order Denying Motion to Disqualify the Special Master; Strike Special Master's Report; and Discharge Special Master, filed on January 5, 2000, and (6) the Order Denying Plaintiff's Non-Hearing Motion for Rehearing of Renewed Motion for Rule 53(e) (2) Oral Hearing and to Disqualify Special Master, to Strike Special Master's Report, and to Discharge Special Master, filed on January 6, 2000.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendant JOHN CANDON, in his capacity as Bankruptcy Trustee of Allan Ryo Kunimoto, have judgment against GARY VICTOR DUBIN and GREGG YOUNG, jointly and severally, in the amount of $40,497.41; and

2. Defendant BANK OF HAWAII have judgment against GARY VICTOR DUBIN and GREGG YOUNG, jointly and severally, in the amount of $76,364.91.

DATED: Honolulu, Hawaii, January 18, 2000.

/s/ DAVID ALAN EZRA

19. Motion For The Recusal Of The Honorable Diarmuid F. O'Scannlain, Declaration Of Gary Victor Dubin, Ninth Circuit Case No. 00-15202, filed October 29, 2001

DECLARATION OF GARY VICTOR DUBIN

I, GARY VICTOR DUBIN, HEREBY DECLARE:

1. I am an attorney admitted to practice law in this United States Court of Appeals and a Member in Good Standing of the Hawaii and California State Bars and the Bar of the United States Supreme Court, and I make the within statements in absolute good faith as the Real Party in Interest in these proceedings and based upon my own personal firsthand knowledge.

2. I believe that the Honorable Diarmuid O'Scannlain is disqualified from and should recuse himself from participating in deciding the merits of this Appeal, and I am presenting this Motion to bring to his attention and to the attention of the present merits panel the reasons therefor.

3. I was bench tried and convicted of failing to fail federal income tax returns by the Honorable Manuel L. Real while a visiting district judge in Hawaii in late 1994, and those misdemeanor convictions were affirmed by a panel of this Court in late 1995 consisting of Circuit Judge Cecil Poole, the author of that Memorandum decision, and Circuit Judges Betty Fletcher and Diarmuid O'Scannlain.

4. Please understand that I am making this Motion not simply because Circuit Judge O'Scannlain was on the merits panel which affirmed my misdemeanor convictions and has now been appointed to hear this Appeal, as I have argued several appeals in this Court on behalf of clients -- since my misdemeanor convictions were affirmed — appearing before Judges of this Court who participated in various stages of reviewing my earlier

misdemeanor convictions, including Circuit Judge Betty Fletcher who was on my merits panel with Circuit Judge O'Scannlain, and I have made no such recusal requests before of them in those subsequent appeals and I have been treated with respect in every such instance without any prejudice whatsoever being shown to me or to any of my clients in those Appeals, which I assume would be the same case with Circuit Judge O'Scannlain now in this case were I not also a party.

5. Please understand that neither am I making this Motion simply because Circuit Judge O'Scannlain was on the merits panel which affirmed my misdemeanor convictions and has now been assigned to an appeal in which I am personally the Real Party in Interest, having been accused with my co-counsel, Mr. Young, by the Honorable David Ezra of supposedly having filed a frivolous complaint below for an improper purpose, for I am aware of this Court's decision in Barnes v. United States, 241 F.2d 252 (9th Cir. 1956), often cited for the view that a judge is not disqualified from hearing a civil matter if he or she presided over a prior criminal matter involving the same party, which might be argued applies in the appellate context as well, even assuming that he or she may have formed an opinion of the party as a result of that prior case, although the Barnes decision is general in nature only and has met with criticism elsewhere and has been rejected in other jurisdictions, Illinois v. Lagardo, 82 Ill. App. 2d 119, 226 N.E. 2d 492 (1967).

6. The reason, however, that I feel compelled to request Circuit Judge O'Scannlain to recuse himself from deciding this Appeal is, instead, because -- in addition to the above broad policy considerations -- the issue of the prior affirmance of my misdemeanor convictions by the merits panel in which Circuit Judge O'Scannlain sat is part and parcel of one of the major issues on appeal in this Case and in Related Case No. 00-151 57 (consolidated for hearing on November 1, 2001, at 9:00 a.m.): the refusal of District Judge Ezra to disqualify himself based upon his display of

bias and prejudice, in part the result of his knowledge and possible behind-the-scenes participation in my earlier misdemeanor convictions and their affirmance (see Opening Brief, pages 46-48, 67-68).

7. Specifically, just prior to my scheduled misdemeanor trial, Judge Real, assigned to Hawaii for the Imelda Marcus multi-district civil trial, hand-picked my case, taking it away on the basis of seniority from the Magistrate Judge assigned by standing order to try my case (who had earlier been selected as my presiding judge by stipulation between me and the Government), ordered me arrested while I was in the hospital, concluding on the basis of hidden and only later discovered ex parte hearsay relayed to his law clerk by the prosecutor that I was supposedly faking my illness, presumably to avoid him, had me escorted by U.S. Marshals to his courtroom, and tried me while without counsel, without my tax or case files, while jailed and without the means of securing witnesses, while even refusing to consider written evidence in the pretrial record that the IRS had written me acknowledging that I had had no filing requirement in the years in question due to business losses, upon which I had relied.

8. And, while I was awaiting this Court's appellate review, I was contacted by Circuit Judge Poole's office manager, whom I had previously never known, warning me that according to her Circuit Judge Poole had become senile, that she had mention it to then Chief Judge Wallace who was planning to take action unless Circuit Judge Poole accepted senior status later that year, and that I should be concerned because a district court judge from Hawaii had been poor mouthing me to her boss.

9. It is not the affirmance of my misdemeanor convictions by the merits panel in which Circuit Judge O'Scannlain sat, and any attempted rehash of the issues in that appeal now, that currently motivates me, please understand.

10. What is relevant here is, first, that by a simple logical process of elimination, I am convinced that it only could have been Judge Ezra who, if what I was told was true, interfered with the fair consideration of my earlier appeal of my misdemeanor convictions in this Court, and, second, that the result below in this new case and Judge Ezra's statements on the record here were the direct result of that bias and prejudice.

11. For instance, in the Declaration Disqualifying Judge Ezra which I filed below on January 8, 1999 (Excerpts of Record ("ER") — Volume Two — pages 355-360), set forth for the panel's convenience in Exhibit "A" attached hereto, the issue of Judge Ezra's involvement in the defeat of my earlier appeal became a material part of the reasons for his disqualification (see Paragraphs 17 and 18 on ER pages 358).

12. Similarly, at the earlier disqualification hearing held before Judge Ezra on December 22, 1998 (ER pages 400-401, 416-418, 432-436), that issue also became dominant, as shown in Exhibit "B".

13. Given the unique circumstances of my misdemeanor convictions, and the fact that my credibility is necessarily one of the issues on appeal here in this Rule 11 case since Judge Ezra's announced findings were expressly based upon his "longstanding" character assessment of me, I believe that it is unfair to now have me judged, and this Appeal decided, by a Circuit Judge who was on the merits panel which affirmed my convictions and who, for example, concluded that "Dubin obstructed justice by checking himself into a hospital on the eve of trial," United States v. Dubin, No. 9510040 (9th Cir. 1995) (Unpublished Memorandum).

14. I believe under the circumstances that to do so would constitute an objective appearance of impropriety which would be unfair both to me and to Circuit Judge O'Scannlain, who I would be pleased to have sitting on a

merits panel in future appeals in which I may be involved, but not as a party.

15. I still have the privilege of appearing before you because thankfully my peers in neither State Bar to which I belong found the affirmance of my misdemeanor convictions convincing.

16. The Hawaii Supreme Court's Office of Disciplinary Counsel, after a three-year-long ethics investigation, and despite the fact that the Hawaii Supreme Court Rules make such criminal convictions automatically an irrefutable presumption of a professional ethics violation, concluded that I was denied due process of law and refused to find me in violation of any ethical proscriptions or to impose any sanctions upon me whatsoever, ignoring my formal convictions.

17. And, the California State Bar Court, after a four-year-long ethics investigation, and despite three controlling and relatively recent California Supreme Court decisions mandating an automatic two-year suspension for federal failure-to-file misdemeanor convictions of California attorneys, refused to do so in my case, ignoring its own precedent, and ordered no suspension contrary to its established policy, similarly concluding that I had been denied due process of law.

18. For these reasons, I sincerely believe that I am fully professional justified in requesting that no member of the merits panel which affirmed my misdemeanor convictions in 1995 should sit — or want to sit -- in personal judgment of me in this Rule 11 sanctions Appeal, for otherwise Circuit Judge O'Scannlain's understanding or impressions of me then would bear directly on what he may determine to be the justification or lack thereof for my motion to disqualify Judge Ezra below.

19. There is yet one additional reason why I believe that Circuit Judge O'Scannlain should not hear this

Appeal; subsequent to the affirmance of my misdemeanor convictions, I brought suit in Hawaii state court against the emergency room physician who according to my prosecutor supposedly informed him that I had been faking my illness and had checked myself into the hospital (as my merits panel repeated, supra) in violation of my privacy rights to the confidentiality of my medical records and my right to immediate notice of and the accuracy of any such reporting, with or without my consent.

20. In subsequent sworn oral depositions, the emergency room physician has now been forced to admit that I did not check myself into the hospital and that I was not well when I was taken from my hospital bed by two U.S. Marshals, arrested, and brought to trial before Judge Real almost literally in my hospital gown, and that he was instead frightened by the prosecutor into making misleading statements about my health at the time.

21. I therefore intend to seek to have the mandate recalled in my criminal case in this Court on grounds of fraud upon that earlier panel, a matter which will necessarily come before Circuit Judge O'Scannlain (and Circuit Judge Betty Fletcher), who surely should remain in a position to fairly judge any such motion to recall the mandate in Case No. 95-10040 without being exposed to issues in this Appeal relating to my character.

22. This request has been filed in a timely manner; pursuant to the Court's policies and procedures, the identities of the Judges comprising one's merits panel is not announced until one week prior to the scheduled oral argument; I had earlier returned the Court's "Acknowledgment of Hearing Notice," with a card requesting I be sent the names of the panel members, together with a return address envelope as required, but I received a telephone call from Stella Urrutia of the Clerk's Office several days ago informing me that my acknowledgment had not been received, so I faxed to her, as she requested, a copy thereof, and assuming that the card I sent in was

also lost I checked the Court's Website yesterday, Friday, October 26, 2001, one week prior to the rescheduled hearing, and learned for the first time of the names of the panel members.

23. Whereupon, yesterday I immediately telephoned all Appellee counsel in the case, and Mr. Young, informing them of my intended need and request to have Circuit Judge O'Scannlain recuse himself, and the reasons therefor.

24. Mr. Young shared my concern. Mr. Fans said he would contact his client and contact me later in the day, but did not do so. Ms. Leonard responded with a fax claiming that my concern was frivolous in her view.

25. I submit that I have good and sufficient specific grounds for the recusal of Circuit Judge O'Scannlain, and that such substitution requests should be afforded a liberal interpretation to uphold the integrity of the judicial process.

26. Consequently, Mr. Young and I are requesting either (a) a substitution for Circuit Judge O'Scannlain on the panel or (b) that the hearing on November 1, 2001, proceed with a two-member panel, as we both are willing to waive the three-member requirement, if possible, in order not to delay the proceedings, but only so long as in the judgment of the remaining panel members they believe that their judgment on the merits of the case may be fairly rendered, in disregard of whatever input in their deliberations may have been made by Circuit Judge O'Scannlain to date, which is what understand the requirements of disqualification doctrines mandate with respect to multi-judge panels in such circumstances.

27. I wish to emphasize that this Motion is not intended in any way to question the judgment, the fairness, or the integrity of Circuit Judge O'Scannlain, notwithstanding our obvious apparent difference of opinion

as to the merits of his affirmance of my misdemeanor convictions by Judge Real, whatever the level of his participation in that decision might have been.

28. This Motion is instead based upon the belief that no Judge who decided that criminal appeal should now be asked or expected to judge the validity of the Rule 11 sanctions in the amount of $116,862.32 which have been levied against Mr. Young and me when what happened in that criminal case and in that appeal are part and parcel of issues in this case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Honolulu, Hawaii, on October 27, 2001.

/s/ GARY VICTOR DUBIN

20. Order, Ninth Circuit Case Nos. 00-15157 & 00-15202, filed November 1, 2001

Before: THOMPSON, O'SCANNLAIN, and BERZON, Circuit Judges.

Appellant Gary Victor Dubin's Motion for Recusal is DENIED.

21. Memorandum, Ninth Circuit Case Nos. 00-15157 & 00-15202, filed November 20, 2001

Before: THOMPSON, O'SCANNLAIN, and BERZON, Circuit Judges.

The question before us on appeal is whether the district court judge abused its discretion in either the awarding of or the amount of Rule 11 sanctions. Because the parties are familiar with the facts of the case, we will not restate them here.

The Complaint

"Federal Rule of Civil Procedure 11 provides for the imposition of sanctions when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose." Estate of Blue v. County of Los Angeles, 120 F.3d 982, 985 (9th Cir. 1997). The district court found the complaint that appellants' filed on behalf of the Kunimotos to be both frivolous and "for the improper purpose of harassing and pressuring the Defendants to settle other pending litigation."

"Frivolous filings are those that are both baseless and made without a reasonable and competent inquiry." Buster v. Greisen, 104 F.3d 1186, 1190 (9th Cir. 1997) (quotation marks omitted). Not all of a complaint's claims must be frivolous for Rule 11 sanctions to be appropriate. Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363 (9th Cir. 1991) (en banc).

The Kunimotos lacked standing to file the complaint because once in bankruptcy, a debtor's property rights, including legal causes of action, belong to the bankruptcy estate, under the supervision of the court-appointed trustee. See Bankruptcy Code 11 U.S.C. § 54 1(a); Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707-09 (9th Cir. 1986). All claims alleged on the Kunimotos' behalf originated either before the bankruptcy filing or during the Chapter 11 phase of Mr. Kunimoto's case, and therefore were part of the bankruptcy estate. Mrs. Kunimoto's claims were nearly all entirely derivative of Mr. Kunimoto's causes of action, and are therefore just as frivolous as his. That one or two of Mrs. Kunimoto's claims may not have been derivative on their face does not immunize her complaint from Rule 11 sanctions. Townsend, 929 F.2d at 1363.

We are unconvinced by appellants' arguments that their assertion of standing was colorable. Appellant Young posits that if debtor's claims were the property of the

trustee, the trustee should have been substituted for the plaintiff. But here, the trustee is one of the defendants and so could not have been the plaintiff as well. Moreover, the trustee did not consent to any substitution, and his consent was highly unlikely in light of the history of this litigation.

Both appellants further argue for standing on the theory that because taxes are not dischargeable in bankruptcy, the trustee's alleged failure to pay taxes will cause the plaintiff personal harm in the form of tax liability. Appellants list in a
string cite, with no discussion, five cases that supposedly support their novel argument.

Three of the five cases discuss an exception to the rule precluding standing by a bankruptcy debtor that clearly does not apply here: when a debtor disputes claims of creditors, standing is proper if the disallowance of the claims would create a surplus of assets to be returned to the debtor. Mark Bell Furniture Warehouse, Inc. v. D.M Reid Assoc., LTD., 992 F.2d 7, 10 (1st Cir. 1993), Silverman v. Leucadia, Inc., 37 B.R. 201, 200 (S.D.N.Y. 1982), Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979). Plaintiff in this case did not seek to establish the invalidity of any creditors' claims, and so the "surplus" exception could not possibly apply.

The remaining two cases appellants cite allow debtor plaintiffs to sue trustees for breach of fiduciary duty, which indeed was one of the allegations in plaintiffs' complaints. Yadkin Valley Bank & Trust Co. v. McGee, 5 F.3d 750 (4th Cir. 1993), does so with no discussion of the standing issue. Presumably, standing was not raised by the lawyers in that case or there was trustee consent to the suit.

Reich v. Burke, 54 B.R. 995, 1002 (Bankr. E.D. Mich. 1985), which involved Chapter 7 bankruptcy rather than Chapter 11, begins its discussion by stating: "Although it is undeniable that a Chapter 7 trustee has the duty to preserve estate assets, no case has been found in which it

was held that the duty was owed to the debtor" (emphasis added) (citations omitted). The Reich opinion finds standing nonetheless. The debtor in that case claimed that the trustee negligently allowed the destruction of a property in which debtor had maintained an exemption, a partial property right. The court reasoned that because of the exemption, the trustee's alleged negligence would cause "a loss peculiar to" the debtor. There is no such exemption in this case. Moreover, Reich was brought in the bankruptcy court, not in the district court. Even if such a suit were otherwise viable in the district court, it would require permission by the bankruptcy court, see In re Kashani, 190 B.R. 875, 884 (B.A.P. 9th Cir. 1995), and none was requested or obtained. Finally, in this case the trustee was only one of the defendants, and the alleged duty to preserve the estate cannot possibly support standing against the other defendants, such as the bank.

Appellants also argue that Mrs. Kunimoto's derivative claims were not frivolous, citing Brown v. KFC Nat '1 Management Company, 921 P.2d 146 (Haw. 1996). Though Brown found loss of consortium claims to be independent from their parent claims in the sense that they can be litigated in different forums, Brown made clear that the spouse's consortium claim is "derivative in the sense that [it does~ not arise unless one's spouse has sustained a personal injury."

Brown at 161 (quoting Yamamoto v. Premier Ins. Co., 668 P.2d 42, 48 (Haw. Ct. App. 1983)). Since Mr. Kunimoto could show no personal injury, Mrs. Kunimoto's spousal claims were frivolous.

In sum, the district court did not abuse its discretion in finding that the complaint was "both baseless and made without a reasonable and competent inquiry." Townsend, 929 F.2d at 1362.

Improper Purpose

The district court had ample justification for finding that the complaints were filed for the improper purpose "of harassing and pressuring the Defendants to settle other pending litigation." The complaints largely repeated claims that had been settled in state court. Also, appellants' parade of motions for reconsideration, for striking orders, and for disqualifying the judge and the special master cumulatively suggest a strategy of harassment.

Safe Harbor

Appellants claim that they offered to dismiss the Kunimotos' complaints without prejudice within the 21 day safe harbor period, and that appellees ignored the offer. But the district court was within its discretion in finding that appellants' alleged offers were not sincere proposals but rather disingenuous attempts to force settlement. Appellants proposed only a withdrawal without prejudice; they then failed to file any withdrawal motion with the court or send any proposed withdrawal documents to the bank, though they continued to speak equivocally about the possibility of withdrawing after the safe harbor period ended. In addition, the alleged offer was made only to the bank and therefore has no bearing on the motion for sanctions brought by the trustee.

The Amount of the Penalty

The district court awarded attorneys' fees "after careful consideration" and in the hope of putting "an end to [appellants'] continued misuse of the federal court system." Gaskell v. Weir, 10 F. 3d 626, 629 (9th Cir. 1993), stated that "where the original complaint is the improper pleading, all attorney's fees reasonably incurred in defending against the claims asserted in the complaint form the proper basis for sanctions." Still, we take note that the award in this case is quite large for a Rule 11 penalty.

Appellants make five arguments in contending that the fee award was excessive. First, they argue without

support that fees should be limited to time spent specifically on the standing issue because it was lack of standing that was the basis for dismissal of the case. Rule 11(c)(1)(A) simply states that, "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Fed. R. Civ. P. 11(c)(1)(A). In this case, the district court carefully explained why it found attorney's fees warranted for all the pleadings in the case, not only those opposing standing.

Second, appellants argue that fees should not be awarded for appellees' efforts in carrying out the motions for sanctions. But "the December 1, 1993 amendment to Rule 11 specifically allows a district court to include the costs associated with sanctions proceedings." Margolis v. Ryan, 140 F.3d 850, 854 (9th Cir. 1998).

Third, appellants argue that the bank wrongly bundled, or "lumped" different tasks under single blocks of time. Aware of this concern, the special master conducted a line-by-line in camera comparison of the bank's redacted and unredacted entries. The special master found that for the most part the unredacted records showed "contemporaneous records that were transcribed on the same day as the services were performed." Wherever there was doubt, the special master reduced the fees accordingly.

Fourth, appellants argue that the special master did not consider their evidence of inability to pay. The special master discussed appellants' evidence in its ruling, finding the declarations filed not probative because they failed to account for appellants' assets and liabilities.

Finally, appellants argue that they were denied adequate due process in the fee determination. In fact, the appointment of a special master and the evidentiary hearings comprised more process than what was required. See, e.g., Buster v. Greisen, 104 F.3d 1186, 1190(9th Cir, 1997).

In sum, we find that despite the magnitude of the award, the special master's lengthy proceedings and thorough 36-page opinion substantiate that the award was within the discretion of the district court.

AFFIRMED.

22. Order Denying Petition For Rehearing, Rejecting The Suggestion For Rehearing En Banc, And Amending The Memorandum Disposition, Ninth Circuit Case Nos. 00-15157 & 00-15202, filed February 7, 2002

Before:THOMPSON, O'SCANNLAIN and BERZON, Circuit Judges.

The Memorandum Disposition filed on November 20, 2001, is amended as follows:

After the words "abuse its discretion" in the first full paragraph on page 7, there should be a footnote that reads:

> "If we applied the three-tier standard of United Nat. Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1115 (9th Cir. 2001), reviewing "findings of historical fact under the clearly erroneous standard, the determination that counsel violated the rule under a de novo standard, and the choice of sanction under an abuse of discretion standard," the result would be the same, as we would conclude de novo that counsel did violate Rule 11.

With this amendment, Judges O'Scannlain and Berzon have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc, and Judge Thompson so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

23. Order Staying Mandate, Etc., Ninth Circuit Case Nos. 00-15157 & 00-15202, filed April 25, 2002

Before:THOMPSON, O'SCANNLAIN and BERZON, Circuit Judges.

Appellant Dubin's emergency motion to recall mandate and stay mandate pending filing of petition for writ of certiorari in the Supreme Court is hereby GRANTED. This stay will remain in force for 30 days from the date of filing this order provided that if a petition for certiorari is filed with the Supreme Court within that time, this stay shall remain in force pending the Supreme Court's action on the petition.

Young v. Fidell, Nos. 00-15 157, 00-15202 O'SCANNLAIN, Circuit Judge, dissenting:

We decided this case on November 20, 2001. The mandate issued February 15, 2002. The appellant, who is himself an attorney, waited until the afternoon of Friday, April 19 to file an "emergency" motion to recall and then to stay the mandate pending filing a petition for writ of certiorari. This appears to be a frivolous attempt to buy more time before he is forced to pay the Rule 11 sanctions levied against him by the district court and affirmed by this court. Not so coincidentally, the district court had scheduled a hearing on Monday, April 22 to entertain appellees' motion to obtain the fees sanctioned against appellant.

By filing his motion at this eleventh hour, appellant appears to continue the bad faith legal maneuvers that led to the sanctions against him in the first place.

I vote to deny the motion, and, therefore, I respectfully dissent.

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APPENDIX B

1. Section 1961 of Title 28 of the United States Code

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

2. Letter dated February 10, 2000, from Gary Victor Dubin to Walter A.Y.H. Chinn, Chief Clerk, United States District Court, Honolulu, Hawaii

RE: Kunimoto v. Fidell, et al.; Civil Nos. 98-00453 & 98-00475 DAE-FIY

Dear Mr. Chinn:

Pursuant to the February 4, 2000, Order entered by the Honorable David Alan Ezra in the above-referenced consolidated cases, enclosed herewith please find a First Hawaiian Bank check in the amount of **$116,000.00** made payable to the Clerk of the United States District Court, which represents an all-cash appellate *supersedeas* bond substituting for and staying the enforcement of the "Final Judgment Awarding Rule 11 Sanctions," filed January 18, 2000, pending the outcome of the separate Appeals therefrom which have been assigned Case Nos. 00-15157 (Young) and 00-15202 (Dubin) in the Ninth Circuit Court of Appeals.

Pursuant to that February 4, 2000, bonding Order, your office has been instructed to deposit said funds "into an interest bearing account" forthwith. For this purpose, I would like to suggest that your office consider placing the funds in a long-term certificate of deposit at First Hawaiian Bank, Main Branch, Downtown, where the funds have originated, which is now paying 6% interest, which is currently in excess of any judgment interest that might be added to the "Final Judgment" should the appeals be unsuccessful, since the parties have agreed that the resolution of the appeals could take two to even three years, and for this purpose I am attaching a FHB flyer on its current attractive CD program for your information.

In any event, the funds should naturally be deposited where they will generate the highest interest for the potential benefit of all parties, and of course *not in a financial institution which is a party to the lawsuit*. If you would like my office to assist you in the depositing of these funds, please let me know.

Very truly yours,

/s/ Gary Victor Dubin

GVD/o/encls. ($116,000.00)

[enclosures omitted]

3. Order, Ninth Circuit Case Nos. 00-15157 & 00-15202, filed May 29, 2002

Before: THOMPSON, O'SCANNLAIN, and BERZON, Circuit Judges.

The court's May 10, 2002 order referring the motion of appellees Bank of Hawaii and John Candon for an additional bond to the Appellate Commissioner is vacated.

Appellee's motion for an additional bond pursuant to Federal Rule of Appellate Procedure 41(d)(2)(C) is granted in part as follows. The court's April 25, 2002 stay of the mandate pending the Supreme Court's disposition of appellants' petition for writ of certiorari is conditioned on appellants Dubin and Young posting an additional bond in the amount of $15,800 to account for the difference between the interest that has accrued and will accrue, assuming the current 1 percent rate remains in effect, on the original bond and the interest that has accrued and will accrue on the judgment, at the rate of 6.12 percent, through January 15, 2003, and for costs that have been taxed on appeal. Appellees' request for an additional bond to account for interest accruing through April 18, 2004 is denied without prejudice to a renewed request if the Supreme Court grants appellants' certiorari petition or does not rule on the petition by January 15, 2003.

Appellants Dubin and Young shall post the $15,800 additional bond in one of the alternative forms set forth below and file the bond with the clerk of the district court on

or before June 21, 2002. Appellants Dubin and Young must either: (1) post a cash bond in the amount of $15,800 with the clerk of the district court, which shall be deposited into an interest-bearing account; (2) post a supersedeas bond from a bonding company licensed to do business in the State of Hawaii, which must first be reviewed by opposing counsel; or (3) provide an acceptable security interest in real property with an appraised unencumbered value of an amount equal to or more than 150 percent of the additional bond, after providing opposing counsel with a certified appraisal of property by a licensed appraiser by June 14, 2002.

Appellants' motion for leave to file a renewed petition for rehearing and rehearing en banc is denied.

4. Order, Ninth Circuit Case Nos. 00-15157 & 00-15202, filed June 26, 2002

Before: THOMPSON, O'SCANNLAIN, and BERZON, Circuit Judges.

Appellant Dubin's motion for reconsideration of the panel's May 29, 2002, order is DENIED.

5. Order, Ninth Circuit Case No. 02-71843, filed August 19, 2002

Before:THOMPSON, O'SCANNLAIN and BERZON, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 19977). Accordingly the petition is denied.

No motions for reconsideration, rehearing, clarification, stay of mandate, or any other submissions shall

be filed or entertained in this closed docket or closed docket no. 00-15157.

6. Weekly Average One-Year Constant Maturity Treasury Yield, as published by the Board of Governors of the Federal Reserve System, since January 2000

01/07/2000	6.03
01/14/2000	6.12
01/21/2000	6.13
01/28/2000	6.17
02/04/2000	6.24
02/11/2000	6.20
02/18/2000	6.23
02/25/2000	6.22
03/03/2000	6.18
03/10/2000	6.18
03/17/2000	6.20
03/24/2000	6.24
03/31/2000	6.30
04/07/2000	6.17
04/14/2000	6.14
04/21/2000	6.09
04/28/2000	6.19
05/05/2000	6.24
05/12/2000	6.38
05/19/2000	6.40
05/26/2000	6.28
06/02/2000	6.30
06/09/2000	6.23
06/16/2000	6.14
06/23/2000	6.15
06/30/2000	6.13
07/07/2000	6.08
07/14/2000	6.09
07/21/2000	6.11
07/28/2000	6.06
08/04/2000	6.09
08/11/2000	6.17
08/18/2000	6.21
08/25/2000	6.20
09/01/2000	6.23

09/08/2000	6.20
09/15/2000	6.14
09/22/2000	6.09
09/29/2000	6.08
10/06/2000	6.06
10/13/2000	5.98
10/20/2000	5.94
10/27/2000	6.01
11/03/2000	6.11
11/10/2000	6.14
11/17/2000	6.09
11/24/2000	6.09
12/01/2000	6.00
12/08/2000	5.78
12/15/2000	5.73
12/22/2000	5.44
12/29/2000	5.34
01/05/2001	4.89
01/12/2001	4.79
01/19/2001	4.85
01/26/2001	4.83
02/02/2001	4.66
02/09/2001	4.72
02/16/2001	4.80
02/23/2001	4.69
03/02/2001	4.47
03/09/2001	4.47
03/16/2001	4.31
03/23/2001	4.17
03/30/2001	4.19
04/06/2001	4.00
04/13/2001	4.07
04/20/2001	4.04
04/27/2001	3.82
05/04/2001	3.90
05/11/2001	3.76
05/18/2001	3.76
05/25/2001	3.78
06/01/2001	3.70
06/08/2001	3.64
06/15/2001	3.59
06/22/2001	3.46
06/29/2001	3.60
07/06/2001	3.70
07/13/2001	3.62

07/20/2001	3.60
07/27/2001	3.59
08/03/2001	3.56
08/10/2001	3.50
08/17/2001	3.44
08/24/2001	3.45
08/31/2001	3.44
09/07/2001	3.43
09/14/2001	2.95
09/21/2001	2.60
09/28/2001	2.49
10/05/2001	2.40
10/12/2001	2.39
10/19/2001	2.37
10/26/2001	2.31
11/02/2001	2.11
11/09/2001	1.99
11/16/2001	2.24
11/23/2001	2.35
11/30/2001	2.23
12/07/2001	2.21
12/14/2001	2.17
12/21/2001	2.23
12/28/2001	2.28
01/04/2002	2.24
01/11/2002	2.13
01/18/2002	2.03
01/25/2002	2.18
02/01/2002	2.25
02/08/2002	2.19
02/15/2002	2.24
02/22/2002	2.24
03/01/2002	2.28
03/08/2002	2.41
03/15/2002	2.58
03/22/2002	2.66
03/29/2002	2.70
04/05/2002	2.64
04/12/2002	2.53
04/19/2002	2.42
04/26/2002	2.36
05/03/2002	2.33
05/10/2002	2.31
05/17/2002	2.40
05/24/2002	2.38

05/31/2002	2.35
06/07/2002	2.32
06/14/2002	2.24
06/21/2002	2.13
06/28/2002	2.10
07/05/2002	2.06
07/12/2002	2.00
07/19/2002	1.97
07/26/2002	1.88
08/02/2002	1.82
08/09/2002	1.67